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MARTHA O. HESSE NOMINATION

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON THE

NOMINATION OF MARTHA O. HESSE TO BE COMMISSIONER OF THE FEDERAL ENERGY REGULATORY COMMISSION

JULY 9, 1987

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MARTHA O. HESSE NOMINATION

THURSDAY, JULY 9, 1987

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:56 a.m. in room SD-366, Dirksen Senate Office Building, Hon. J. Bennett Johnston, presiding.

OPENING STATEMENT OF HON. J. BENNETT JOHNSTON, A U.S. SENATOR FROM THE STATE OF LOUISIANA

The CHAIRMAN. The hearing will come to order.

We are starting a couple of minutes early this morning because the Senate has back to back votes followed by a debate in which I will be a participant. So I want to be sure to get this started so that we can get the essential part of the hearing concluded.

I am very pleased to convene today's hearing on the nomination of the Honorable Martha Hesse to be a member of the Federal Energy Regulatory Commission, where she will continue as Chairman.

Let me say at the outset that I am an enthusiastic supporter of her nomination. In her years at DOE and at the Commission she has shown she is bright, capable, straightforward, and a very competent administrator. She is also responsive to the needs and views of the Congress. I have said before that I am impressed with the current Commission. I believe they are doing a very competent job. Martha Hesse is a fine leader, and I am pleased that she has been renominated.

It doesn't mean that I won't reserve the right to disagree, and perhaps even strongly, on some issues as they come along. But in terms of who should be on the Commission at this particular point, in my view it is very clear.

This nomination hearing comes at a critical time in the natural gas industry. It may seem more like a natural gas oversight hearing than a nomination hearing. As everyone in this room knows, the Court of Appeals for the District of Columbia Circuit issued its decision on June 23rd in the consolidated cases for the review of Order No. 436. The Court upheld the substance of Order No. 436 and the procedures the Commission employed in adopting it. However, they vacated it and remanded it for further proceedings.

I was very pleased to note that the Court found that the Commission has plenty of statutory authority to deal with the transportation issues, and to deal with the take or pay issues. In fact, the

Court found that the Commission has very broad statutory authority.

I want to urge Chairman Hesse and her colleagues to make the fullest use of that authority. The Commission must deal convincingly with the past take or pay liabilities. It must also give the industry a way to avoid new liabilities without crippling both pipelines and producers.

I might say that the Commission, I think, is better equipped to deal with take or pay than we are. It would bog us down in such protracted, difficult, tedious proceedings about which there is not a full consensus, and which would take so much time on the Floor when there is not that much Floor time to be had, that I think it is very appropriately something that FERC ought to do and not we.

I must say, there was a great collective sigh of relief when the Circuit Court made their decision. We were all fearful that they would rule that FERC didn't have the authority, and then we would have to deal with it.

Natural gas is a vital natural resource. We need a healthy industry. The public has a right to expect that responsible regulators will take the steps necessary to insure the long-term viability of the industry.

So welcome, Chairman Hesse. The rules of the Committee, which apply to all nominees, require that they be sworn in connection with their testimony. Please rise and raise your right hand.

[Whereupon, Martha O. Hesse was duly sworn by the Chairman.]

The CHAIRMAN. Please be seated. Before you begin your statement I will ask three questions addressed to each nominee before this Committee.

First, will you be available to appear before this Committee and other Congressional committees to represent Commission positions and respond to issues of concern to the Congress?

Ms. HESSE. I will.

The CHAIRMAN. Are you aware of any personal holdings, investments, or conflicts that could constitute a conflict of interest or create the appearance of such a conflict should you be confirmed and assume the office to which you have been nominated by the President?

Ms. HESSE. My investments, personal holdings and other interests have been reviewed both by myself and the appropriate ethics counselors within the Federal Government. I have taken appropriate action to avoid any conflicts of interest. There are no conflicts of interest or appearance thereof to my knowledge.

The CHAIRMAN. Are you involved or do you have any assets held in blind trusts?

Ms. HESSE. I do not.

The CHAIRMAN. Very good. You may proceed. Your written statement will, of course, be put into the record.

STATEMENT OF HON. MARTHA O. HESSE, NOMINEE TO BE CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

Ms. HESSE. Mr. Chairman, I have a reasonably lengthy opening statement, which I have submitted for the record. It is lengthy I think because we have accomplished a lot in the last nine months

at the Commission. I wanted to have the opportunity to talk about what we have done and what we will continue to do.

I also actually have a pretty long oral summary. But I think in the interests of time and since we have started early that I will not go through that. I would like to just mention a couple of things.

First of all, when I was confirmed last time I did indicate my interest in getting the Commission moving and in processing the caseload, especially the backlog. I am really happy to note that in seven months the Commission processed more than 9,000 docketed cases. I think that is an outstanding contribution, and we intend to keep up the good work.

In the gas area, as you know, we have a number of important initiatives that we have been pursuing since January with the Natural Gas Strategy. The Court's return of Order No. 436 a couple of weeks ago I think was very helpful in that, as you noticed and mentioned, it upheld most of the policy and the procedures within Order No. 436. It did note a few concerns and vacated and remanded the Order to the Commission.

We have noted those concerns and are committed to correcting them. Last Thursday we issued an order that stayed the contract demand adjustment provisions, and also made two important points. The first point was that we do not expect to seek rehearing of the Court's decision. The second, that we will promulgate an interim rule for Order No. 436. I expect to have this before the Commission at its meeting on July 28. So the interim rule will be ready to put into effect as soon as the Court issues its mandate.

The other area that I think bears mentioning is the electric area. We have been concerned about and working toward development of an electric strategy. To that end we have undertaken to review our PURPA regulations. As you know, we did conduct a number of regional conferences and we have put forth a number of proposals which we intend to memorialize in rulemaking, if you will, that we hope will fix what we can fix in the area of PURPA.

We are looking at competitive bidding. We're looking at an auction process that would not be mandatory. It would be an option for the states. But also to include in that process not only qualified facilities or co-generation, but also the utility's own construction plans. And we're looking at including in it——

The CHAIRMAN. As you know, I have written you a letter on that.

Ms. HESSE. I know it. And thank you.

The CHAIRMAN. Commending your efforts.

Ms. HESSE. And we intend to move forward with that. I think in the hydro area that we are committed to implementing quickly and effectively the ECPA legislation, and have made great progress in that area as well.

Finally, I would like to say that I do look forward to continuing as Chairman of the Commission if confirmed. I want to thank the staff and certainly my fellow commissioners for helping me in that effort, and you and the Committee staff as well.

[The prepared statement of Ms. Hesse follows:]

STATEMENT OF

MARTHA O. HESSE,

NOMINEE TO BE A MEMBER

OF THE

FEDERAL ENERGY REGULATORY COMMISSION,

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

JULY 9, 1987

STATEMENT OF MARTHA O. HESSE, NOMINEE TO
BE A MEMBER, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman, and Members of the Committee, I am again honored to appear before you as President Reagan's nominee for the Federal Energy Regulatory Commission. As you know, I have served as Chairman of the Commission since October 1986, when I filled the unexpired portion of my predecessor's term.

I. MANAGEMENT AND POLICY OVERVIEW

I am happy to report that the Commission has made great strides in case processing during the last nine months. We contracted for an independent review of our management systems and we have implemented many of the suggested reforms.

For example, we instituted a case tracking system that identifies cases that are delayed and ones that lend themselves to generic resolution. Delegated authority is now being exercised to its fullest extent. And we have inaugurated an automated office support system throughout the Commission.

Our case tracking system shows that the Commission completed almost 9000 docketed cases in the technical program areas between October 31 and May 31. The Commission has made a deep inroad against the case backlog especially in the areas of cogeneration and hydroelectric power. In the hydro area, the Commission has achieved nearly a 20 percent reduction in pending caseload between October 1986 and May of this year. This progress in case processing has been truly gratifying.

On a substantive level, the Commission's efforts have focused on establishing generic regulatory policies that enhance the role of competition in both gas and electric energy markets. And where market power is too strong to rely on competition, the Commission has sought to regulate in such a way as to simulate competitive outcomes. Allowing competitive influences to direct market activities, we believe, will minimize the disparity between demand and supply and thereby benefit providers and consumers alike of all forms of energy.

To this end, the fundamental objectives directing the Commission's regulation of both natural gas and electric power have been: 1) to increase the access of purchasers to producers of energy, in order to enlarge the number of options from which purchasers may choose; and 2) to design rates for the various services entailed in transmitting gas or electricity from the producer to the consumer so that those rates allocate services by reflecting the value in the marketplace of the services being performed.

II. NATURAL GAS INITIATIVES

On the gas side, these principles have been carried out by the comprehensive gas strategy announced on January 15, 1987, outlining initiatives dealing with transportation of natural gas, the mounting burden of pipelines' take-or-pay costs, abandonment of wellhead sales under obsolete or expired contracts, the assurance of fair market practices in the world of less regulation, and rate design that unbundles services and costs. I am pleased to report to you that in developing policies in each of these areas the Commission has adhered to the timetable announced in that strategy paper.

A. Gas Transportation

Regarding transportation, I am sure you are aware that two weeks ago the D.C. Circuit remanded the Commission's Order No. 436, which had been the Commission's initial generic effort to implement a gas transportation program. The court upheld the essential authority invoked by the Commission to condition transportation on the pipelines offering transportation service to all potential shippers at non-discriminatory rates. The court sent the rule back to the Commission, however, for work principally on the rule's requirement that pipelines allow their LDC customers to adjust their contract demand quantities and on the rule's failure to adequately address the take-or-pay issue.

The Commission is committed to continuing to foster open access transportation and will react swiftly to the court's remand. In fact, the Commission issued an order within ten days of the court's remand suspending operation of the CD adjustment requirements and announcing the intention to promptly issue an order promulgating an interim rule responsive to the court's remand, pending notice and comment procedures on a new final rule. We intend to have a proposal for an interim rule before the Commission for its consideration by the end of this month. We will have an interim rule ready to put into place on August 7, which is the date the court's mandate will issue if no party files for rehearing of the court's decision.

The Commission itself does not intend to file for rehearing, but even if some other party does file and the court's mandate remains stayed, we will have the interim rule ready to go and we may, at some point, ask the court for leave to make the interim rule effective.

In addition to moving quickly on the generic rule, the Commission has been responsive to the individual requests for open-access authority. In fact, I am pleased to inform you that the Commission has acted on all of the 436 filings that were pending when I began at the Commission and most of the filings that were made since I arrived. This includes applications of twenty-five major pipelines as well as those of a number of smaller pipeline companies. And the Commission is continuing to process

these applications expeditiously. In fact there are three rate settlements on the agenda for next week's meeting. We will begin issuing orders on rehearing just as soon as we sort out our response to the court's remand.

Thus, I can safely say that transportation is here to stay during my tenure.

B. Take-or-Pay

Take-or-pay is a difficult issue before the Commission at this time. The problem is two-fold -- eliminating the troublesome accumulation of past take-or-pay costs and avoiding the same mistakes in the future. The problem thus calls for a two-pronged solution.

As to past take-or-pay costs the Commission is presently working on a number of fronts toward establishing a context within which producers, pipelines, and their customers will have the proper incentives to each bear their appropriate share of these costs of transition from a government-regulated to a competition-regulated market.

First, we issued a proposed policy statement on take-or-pay in March. Over 150 comments received by the April 10 deadline are presently being analyzed. That proposal would offer an alternative method for recovery by pipelines of take-or-pay buy-out or buy-down costs.

One method is to allow recovery by pipelines of all prudently incurred take-or-pay costs as gas costs, in the commodity charge. As commodity charges, they will be recovered as the pipeline sells its gas.

The proposed policy statement provides another method whereby pipelines are guaranteed recovery of some equitable share, such as 50 percent, of take-or-pay buy-out or buy-down costs through a surcharge if the pipelines are willing to absorb an equitable share. Such a mechanism would carry out the Commission's conviction that all segments of the industry -- producers, pipelines and consumers -- should share in the resolution of past take-or-pay costs.

In addition to the proposed policy statement on recovery of costs, the Commission is considering a number of options to resolve the past take-or-pay problem in response to the court's remand on Order 436. The Commission seeks to provide incentives to producers and distributors -- dealing with both ends of the pipeline in a balanced fashion -- to resolve the take-or-pay problem. We will choose some options and explain our choices in the interim rule we promulgate in response to the remand of Order No. 436.

In addition, the Commission's proposed rule on abandonment, which I will discuss further in a moment, will alleviate increases in take-or-pay liability under existing contracts after those contracts have expired.

For the future, our rate design proposal which I also will further discuss in a moment, will deal with the problem of avoiding future take-or-pay problems by instituting mechanisms whereby parties who desire firm supply service will pay for the value of that service and the cost of the gas inventory behind it.

I remain committed to the Commission doing its part in resolving the take-or-pay obstacle to achieving a rational gas market.

C. Abandonment

As I mentioned, the Commission's abandonment policy is another important area we have undertaken to adjust to the current gas supply-demand circumstances.

In early May, the Commission approved a proposed rule that would grant automatic authority to abandon the purchase or sale of gas if the contract has expired or if the parties mutually agree to terminate or modify the contract.

The proposal would treat both producers and purchasers evenhandedly and allow either party to terminate its purchase or sale obligation when the contract term expires. The proposal would require pipelines who initiate the abandonment to provide transportation for the producer.

Because Congress excluded newly discovered gas from Natural Gas Act dedication, dedicated reserves are necessarily diminishing and, as Congress ordained, will play a diminishing role in the future gas supply market.

Facilitating abandonment will enhance flexibility in the market with the result that the nation's entire gas supply can be more efficiently utilized to satisfy consumer needs.

D. Fair Market Practices

The emergence of gas marketers is a natural phenomenon in this new, more open marketplace where producers and consumers deal directly.

But gas marketing companies that are affiliated with pipelines inherently enjoy the potential for preferential access to pipeline capacity that could inhibit competition and thereby impede the transmission of price signals.

At the Commission's May 13 meeting, we approved a Notice of Proposed Rulemaking to deal with these problems. The NOPR proposes standards of conduct for interstate pipeline marketing affiliates, as well as reporting and recordkeeping procedures for transportation requests.

In addition, the Commission has established a special telephone line with direct access to an enforcement task force where allegations of undue discrimination can be made. The task force will attempt to work out problems on an informal, expedited basis.

The task force is proving to be a successful innovation. Since its inception last month, it has received roughly 40 calls and resolved about 27 problems.

E. Rate Design

Rate design is the toughest issue we are wrestling with at this time. Efficiency in the market requires that rates reflect the value of the service or commodity being sold as well as the costs. Implementing this principle requires a number of very fundamental changes in the way the Commission designs rates.

For one thing, for value to be the rate setter, rates must be prospective. We must leave behind our habit of setting rates by always determining what rates should have been and requiring refunds. This retrospection simply distorts price signals to the market.

Other important criteria for value-set rates are:

-- Services should be available on an unbundled (a la carte) and bundled basis, so the customer has more choices;

-- Rates should be mileage-based and seasonally differentiated;

-- Projections should be eliminated or de-emphasized in the rate process to avoid inaccuracies that skew the rates;

-- Full requirements, sole supplier, and dedicated territory contracts should be reviewed where they may be anticompetitive.

The Commission will have before it for decision this summer a proposal for a rate design rulemaking incorporating these principles.

In addition to unbundling rates, an innovative idea to achieve market-driven rates is to auction transmission capacity to allow the market to allocate capacity.

We have contracted with a university for an auction simulation. Further, we intend to conduct a pilot program to provide first-hand operational experience with new rate design methods such as auctions. When we can assess all of this information, we hope to move forward with the auction concept as soon as possible.

F. Northeast Pipeline Capacity

A topic of immediate interest that is not covered by the announced gas strategy is the plethora of proposals for expanding pipeline capacity in the Northeast. We have devised a systematic procedure for evaluating these proposals that we will begin to implement at the Commission's upcoming meeting next week.

Currently pending before the Commission are at least 16 separate pipeline construction proposals designed to provide gas service to the Northeast/Mid-Atlantic areas. They involve Canadian and domestic supplies that will supplement system supply and serve incremental markets.

These proposals could involve huge sums of money -- between $2 and 3 billion -- and huge volumes of new capacity -- 3.3 billion cubic feet, even after subtracting duplicative projects, which is 50 percent more than present capacity.

These applications include both traditional and optional certificate authority and comprise thousands of pages of documentation. But even apart from size, the complexity of these cases is substantial. Many raise competing issues that must be carefully analyzed and compared with data in other applications.

Finally, many of these proposals involve sensitive environmental issues that must be thoroughly aired and carefully weighed. In some cases, an environmental impact statement must be prepared.

At the upcoming Commission meeting, the Commission is scheduled to consider a proposal establishing a systematic procedure allowing the Commission to go forward with processing viable proposals for increasing capacity to the Northwest. I can assure you that in the course of these proceedings, the Commission will take deliberate care of environmental concerns involved in the various proposals.

We anticipate that the updated record and a recommended decision will be ready for the Commission's consideration by early 1989 and gas can flow for the 89-90 heating season.

In the meantime, in conjunction with the institution of these procedures next week, the Commission will also consider disposition of a number of the pending proposals that are now ripe for decision.

As part of this process, the Commission expects to clarify use of its optional certificate procedure in the context of these large projects.

The Commission recognizes that resolution of the pending applications is important to help move the East Coast Market into the next era of gas supply and delivery. We are committed to systematically processing these cases so that gas can begin flowing.

III. ELECTRIC ENERGY PROPOSALS

The electric utility industry clearly is in a state of transition. New technologies and economic realities are forcing the industry to change more rapidly and dramatically than perhaps any time in the last fifty years. Regulation must keep pace with this change to ensure good industry performance in the future.

The Commission is addressing this challenge through a comprehensive review of its policies toward the electricity industry. When I took office, the Notice of Inquiry addressing bulk power pricing and transmission had already been initiated. The NOI did not, however, directly address cogeneration and small power production. Therefore, we held several regional conferences this spring to evaluate our implementation of PURPA. The NOI and the PURPA conferences had an overwhelming response. The Commission received hundreds of comments reflecting a wide array of interests and ideas.

It is now time for the Commission to develop an integrated set of policies toward the electricity industry that together form a comprehensive and consistent regulatory framework, within the Commission's statutory authority.

I realize that we cannot do everything at once. Therefore, the Commission should proceed incrementally. The first general area we will focus on will be PURPA and, in general, the role of independent power producers. PURPA has evolved into something beyond everyone's expectations, and has fostered a multi-billion dollar industry providing a majority of the new generating capacity in several regions of the country. The Commission's rules, and the state's implementation of them, did not generally anticipate the large role PURPA has come to play.

I have recommended that the Commission pursue new approaches under PURPA in four general areas: First, a major issue of concern to utilities is whether states can require them to make avoided capacity payments where no capacity is needed. No one wants to pay for nothing. However, new generating capacity eventually will be needed on every utility system to meet load or replace existing capacity. The Commission should attempt to provide guidance to the states on their flexibility to allow capacity payments where capacity will not be avoided until the future.

A second initiative would be to offer a market-driven solution to avoided cost pricing problems. Guidelines should be established for competitive bidding systems as an alternative to administratively determined avoided cost rates. In this regard, it may be appropriate to subject a utility's construction program to the market test of competing with Qualifying Facilities (QFs), as well as other sources of capacity such as purchases from other utilities and non-QF, non-utility power plants constructed by entrepreneurs. I would like to emphasize, however, that bidding schemes would not be mandatory. Our effort would be to provide guidance, not to impose an entirely new set of avoided cost rules on the states.

A third area of potential reform relates to competitive bidding. There may be many independent generators who do not meet the QF criteria and who may be discouraged from participating in the competitive process because of regulatory requirements. The Commission should investigate whether it can or should implement a streamlined regulation for non-QF independent power producers who have no market power. Such independents might include industrial generators that do not meet the technical QF requirements, third-party generators built and owned by non-utility firms, and stand-alone generating plants built by utilities outside their zones of economic influence. Since these entities have no market power, traditional regulation appears inappropriate. Therefore, the Commission should investigate whether it can provide enhanced rate flexibility as well as reduced administrative burdens for these generators.

The fourth major area involves procedural and technical issues raised in the hearings. The Commission should consider issuing rules dealing with such issues as QF certification requirements, allowable waste fuels for small power production, use of fossil fuels in small power facilities and procedures for PURPA data collection.

The initiatives I have described will not end the Commission's examination of its electric policies. I envision three other broad areas that need to be addressed. One is bulk power pricing. We need to allow more flexible pricing in competitive wholesale markets and to require true economic price signals in non-competitive markets. A second area is transmission pricing and access. Transmission obviously is a key -- and very complex -- factor in moving toward market solutions. And third is incentive regulation. We simply must move toward a system that provides incentives for good performance in the future instead of trying to determine who should pay for the mistakes of the past.

I will be discussing these last three broad areas with my fellow commissioners to get their thoughts on what needs to be done and how. Hopefully, over the next few months, we can agree on the phasing and timing of the Commission's approach to the rest of the electric strategy.

IV. HYDROPOWER PROGRAM

The Commission's efforts in the hydro area are primarily devoted to several major initiatives related to the enactment last fall of the Electric Consumers Protection Act (ECPA). Immediately following enactment of ECPA I formed a high-level task force to develop policy guidance to help the Commission carry out its congressional mandate. The task force provides the Commission with a multi-disciplinary outlook on the issues presented by ECPA. This task force will remain in place until ECPA is fully implemented.

Additionally, the Commission has issued two rules required by ECPA. The first rule, issued on February 13, 1987, addressed which projects are exempt from the new ECPA environmental requirements for PURPA benefits because the applicant had already committed substantial monetary resources to the project prior to enactment of ECPA. The second rule, issued on March 30, 1987, established the information that existing licensees must make available when notifying the Commission of their intention to apply for a new license.

We have also issued a notice of proposed rulemaking setting forth the procedures for assessing and collecting fees for reimbursing Federal and state fish and wildlife agencies for the costs of certain of their studies and reviews, as required by ECPA.

Our goals in implementing ECPA are to provide an orderly transition from yesterday's criteria for licensing to today's, and to ensure that both developmental and non-developmental values are given equal consideration in our licensing decisions.

In addition to moving quickly in implementing ECPA, the Commission has been responsive in acting on hydropower applications in an expedited fashion. Indeed, As I mentioned earlier, the pending hydropower applications have been reduced by nearly 20 percent since I arrived.

CONCLUSION

In conclusion, I want to say that I have truly enjoyed the past several months at the Commission. I believe we have made substantial progress in processing cases efficiently and in establishing important policies that foster economically efficient functioning of the industries we regulate.

I want to share that success with the staff and my fellow Commissioners. And I also appreciate all the help and support I have received from the Committee members and your staffs.

I look forward, if confirmed, to continued work to implement the plans and policies we have initiated thus far.

The CHAIRMAN. Thank you very much, Chairman Hesse.

We do have a role call vote on right now, followed by, as I mentioned, a debate which I will be involved in. So if I do not make it back immediately following this vote, it will be because I am speaking on the Floor. You will be available for questioning from other members, should they be here.

Thank you very much.

[Recess.]

STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator HATFIELD [presiding]. On the advice of staff of the majority party, it has been suggested that I convene the hearing at this moment in waiting for the Chairman to arrive, who is engaged in discussions of matters on the Floor.

Members of the Committee, it is an honor for me personally to sit on this side of the witness table today to present to the Committee Martha Hesse as President Reagan's nominee to continue as Chairman of the Federal Energy Regulatory Commission.

The Committee will recall that it was just ten months ago that Chairman Hesse came before this Committee to first be confirmed as a FERC commissioner with the understanding that the President would designate her as Chairperson.

The intervening months have been a time of change and challenge to FERC as the Commission has tackled problems head on. The leadership of Chairperson Hesse is acknowledged as the guiding force for many of the most difficult decisions the Commission has faced.

Instead of side-stepping these complex issues, the Commission has staked out innovative positions on several persistent problems. This is precisely the kind of courageous leadership that government service demands.

During the last several years I have seen Chairperson Hesse make the transition from successful businesswoman to dedicated public servant. As members of the Committee know, this is no small accomplishment, as we all have seen successful individuals who could not adjust to the change demanded in public life. In her six years in the Reagan administration, Chairperson Hesse has displayed the flexibility to adapt to a number of diverse and complex assignments.

As I told the Committee when I had the privilege of introducing her last year, I first became acquainted with Martha Hesse when she served as Assistant Secretary for Management and Administration at the Department of Energy. Her testimony before this committee and the Senate Appropriations Committee always was similar to her management style at FERC: forthright, honest and to the point.

The next several years are going to be difficult ones for all of us involved in shaping energy policy in the United States. As the country faces the expected oil crunch, we will need to move to other resources to provide our homes and factories with the necessary energy to continue our way of life.

To develop and implement those policies we will need a person with vision to develop policy to allocate our hydro and natural gas resources. I believe that Martha Hesse is the person who can accomplish those goals, and I urge the committee to reaffirm her as Chairperson of the Federal Energy Regulatory Commission.

Are there any other opening comments or statements that members wish to offer at this time? If not, Chairperson Hesse, we are pleased to welcome you here today. If you have a statement, we would be pleased to hear it at this time.

I am told that the statement has been received by the committee. You are free to summarize or highlight that statement as you wish.

Ms. HESSE. Thank you. Senator Hatfield, I do appreciate the lovely introduction. Thank you very much.

I already did give an opening statement and a brief summary of that when Chairman Johnston was here.

Senator HATFIELD. Are there questions the committee members wish to pose at this time? I have provided the committee staff with written questions that at your earliest convenience I would appreciate a response to, which will be made a part of the record.

The Senator from Nevada.

Senator HECHT. Thank you, Mr. Chairman. I have no statement. I only want to express my support for Martha Hesse. I think she's done a good job and I think she'll do good in the future.

Ms. HESSE. Thank you, Senator.

Senator HATFIELD. The Senator from Connecticut, Senator Weicker. Excuse me, Senator Weicker, for not recognizing you.

STATEMENT OF HON. LOWELL P. WEICKER, JR., A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator WEICKER. Not at all.

First, let me welcome Mrs. Hesse to the hearings, and to say that I appreciate the efforts of the Commission in the hearings which they held on the Iroquois Gas Transmission System in Connecticut last year.

I thought that all matters were being fairly and openly presented to the public and to the Commission. As Mrs. Hesse knows, I have been put in the position of having to intervene in the Iroquois Gas Transmission System proposal because of ex parte communications that occurred between the Commission and Iroquois Gas Transmission.

As I stated in the formal petition which I submitted to the Court:

> It has become necessary to file this motion due to the recent disclosure of non-public Iroquois Gas Transmission System proposals to the Commission regarding procedures to be used by the Commission for reviewing the pending IGTS certificate application.
>
> The failure of IGTS to adequately and duly apprise the other parties to these proceedings of their proposal places interests and rights in jeopardy. Commission consideration of the IGTS proposal without an opportunity for others to comment to make alternative recommendations would not be fair and equitable, would not satisfy the requirements of law and Commission regulations, nor would it be in the public interest.
>
> It has been brought to Senator Weicker's attention that the Commission's General Counsel, Katherine Cook, and IGTS counsel, Frederick Louther, met on March 3, 1987 to discuss an IGTS proposal for Commission procedure for action on the pending IGTS application for a pipeline certificate. This is confirmed by an IGTS docu-

ment, memorandum filed by F. M. Louther Re: Proposed FERC ERA Procedures for IGTS Need Determination, dated March 5, 1987.

The March 5 document does not give any indication of the outcome of that discussion, particularly whether or not the Commission staff agreed to adopt any or all of the proposed procedures.

Now, I am sensitive enough, I might add, to this situation to the point where I did not even meet with Mrs. Hesse, as is normal procedure, prior to these hearings, in the sense that it could be interpreted that we had discussions on this matter. Especially when the Iroquois Gas Transmission proposal has not shifted to an entirely new route. We are going to hold hearings of the committee in Connecticut.

What disturbs me, Mrs. Hesse—Is this normal procedure, what happened with these ex parte communications? If so, it seems to me that it clearly leaves the public at a tremendous disadvantage, at least the interested public, those whose property the line would go through. I would like to have your comments on that aspect of the matter.

Ms. HESSE. Senator Weicker, I, as a matter of policy, encourage the other commissioners and the staff to talk with people from the industry because if we do not have discussions with people from the industry, our only base of information therefore is what we read in the press. I think that unduly isolates us in matters of policy.

But these communications I think have certain rules that govern them. I think that there are appropriate standards of behavior, that we are permitted to discuss procedure in matters before the Commission, but not substance. I depend not only on the staff and the other commissioners, but other interested parties as well to know those rules and to follow them.

Having said that, in the case of the conversation between the general counsel and a representative of Iroquois, whom I am not familiar with, there seems to be some difference of opinion about whether or not there were ex parte communications. It is my understanding that it was a courtesy visit and that very general procedure was discussed, and nothing more.

I have known Catherine Cook, the general counsel, for several years. I worked with her at the Department of Energy before she joined me at the Commission. I have always found her to be an exceptionally straightforward individual who is very committed to the rules that govern our communications.

I would find it highly unlikely that she would engage in ex parte communications.

Senator WEICKER. Well, that of course is not what we would seem to apprise from the record. The meeting took place, but the nature of the meeting seems to be at issue.

Nobody from Connecticut can just walk into your office and start discussing this. This is what worries me. High paid and high priced lawyers and lobbyists, they can go into the Commission and discuss their clients needs and desires. But there are a lot of landowners up there who have a few rights also.

I don't see where they have that sort of revolving door available to them. I suppose what bothers me is that everything that has been done insofar as my role, your role, the hearings in Connecti-

cut, have been done in full public view. Now, we have taken a turn in the road here, at least as far as the Commission is concerned, that the proceedings go on behind closed doors.

As you know, we now have an entirely different proposal before us from Iroquois Gas Transmission, the first one having received considerable opposition for a variety of reasons. We're now going through a different part of the state, additionally more of New York State and less of Connecticut.

I just don't see really where anything should take place at all except in public. Let me say this also: Your procedure in so many of these matters governs the substance. In your opening statement, in your statement before the Committee, you say,

> At the upcoming Commission meeting the Commission is scheduled to consider a proposal establishing a systematic procedural line for the Commission to go forward processing viable proposals for increasing capacity to the northeast.

I gather this was sort of a packaging of a whole series of proposals. Is that correct? That is a considerably different procedure.

Ms. HESSE. That's correct.

Senator WEICKER. I gather, for instance, that procedure may or may not be looked on favorably. If you adopted that, it could or could not be looked upon favorably by Iroquois. They might not like that particular procedure.

I'm just making the point that procedure is terribly important for the substance and for the timing of all these things. So it isn't a question of, we didn't discuss substance, all we did was discuss procedure. The two are very much tied together. Wouldn't you agree?

Ms. HESSE. I think that your point is well taken. It's a very regrettable situation. I think that we're all concerned about what happened and we have made an effort to make certain that it will never happen again.

Senator WEICKER. I have no further questions, Mr. Chairman.

Senator FORD [presiding]. Senator Bradley has a statement for the record. I will ask unanimous consent that it be included in the record.

[The prepared statement of Senator Bradley follows:]

STATEMENT BY SENATOR BILL BRADLEY AT THE ENERGY COMMITTEE HEARING TO CONSIDER THE NOMINATION OF MARTHA HESSE TO THE FEDERAL ENERGY REGULATORY COMMISSION

JULY 9, 1987

MR. CHAIRMAN, Chairman Hesse has been at the helm of the Federal Energy Regulatory Commission for some months now and appears to have taken charge. Her predecessor, Chairman O'Connor, initiated a number of efforts - notably the open-access transportation Order 436 - to foster competition in the utility industry. I am happy and relieved to see that Chairman Hesse has continued with some vigor along this path of increased competition.

It is especially important that these efforts be redoubled now in the face of the recent Court of Appeals decision to remand Order 436 back to the Commission. While Chairman Hesse has indicated an interest to move rapidly, we will need action soon. As the Committee is well aware, I have been interested in achieving true open-access to gas pipelines for producers and consumers for a number of years. I am still waiting. However, I believe there is still hope that the FERC will act responsibly.

The timing of this nomination hearing is particularly important. The gas and electric utility industry is in transition. The effort clearly is well underway to move the industry from the shelter of regulation to more competition.

This effort must continue and, for that reason, I expect to endorse Chairman Hesse's reappointment.

I note though that the Chairman's appointment currently expires in October. The term of another FERC Commissioner, Charles Stalon, also expires this October. At this time, it is unclear whether Mr. Stalon will be renominated or another will be asked to replace him. Because of the importance of FERC action at this critical juncture, I would recommend to the Committee that we postpone final action on Chairman's Hesse renomination until we know what action the Administration intends for this opening at the Commission.

My own interest, as I've stated, is to see the work continue at the FERC. Commissioner Stalon has been an intellectual force and a hard worker at the Commission. He was one of the architects of Order 436 and is uniquely capable of maintaining this critical momentum towards a competitive environment. Obviously, I think it would be appropriate and wise to renominate Commissioner Stalon. However, if the Administration chooses not to renominate Mr. Stalon, I would like to be assured that their nominee has at least a similar perspective and the same depth of expertise as Charles Stalon.

I look forward to the Committee's deliberation and action on both of these appointments to the Commission.

Senator FORD. Are there any other Senators who have questions? Dan, you may proceed.

Senator EVANS. Thank you, Mr. Chairman.

Madame Chairman, let me refer to your full statement. I have a particular interest, as you might guess, coming from the northwest in the electric, and particularly the hydroelectric parts of FERC's activities.

On page 9 you talk about rate design. In talking about rate design, at least in your statement, you're talking about it in a generic sense. As it applies to electric rate setting or approval, I think it's highly commendable to get to the point where we're talking about prospective rather than retrospective rate approval.

I know that it's been the custom, as I remember, for FERC to examine Bonneville's rate structures as they go through a rate case or after they've gone through a rate case. At times, as I remember, FERC's approval or comments come virtually at the end of the rate case. So it is thoroughly retrospective. Do you have any comments on that particular relationship and the responsibility you have toward Bonneville and its rates, and what the future is likely to be in terms of FERC's comments or FERC's approval?

Ms. HESSE. Senator Evans, we have sort of a unique relationship with Bonneville in that we do not set rates. We can only approve them or disapprove them.

Senator EVANS. I understand.

Ms. HESSE. I share your concern about the length of time that it takes to process electric cases, not only Bonneville's, but electric cases in general. We have made an effort within the Commission in the last seven or eight months to set up some procedures to make certain that we can in the future process, in particular, Bonneville's rate requests, as quickly as possible.

Because of due process and the Administrative Procedures Act and intervenors, anyone who cares to intervene can. Of course, that lengthens the time of the process. We're interested in shortening that as much as we can. We will continue to do that.

As far as Bonneville's role in the northwest, it plays a very important role in the northwest. I share your concerns on that.

Senator EVANS. I am not aware of any time, at least in the recent future, that FERC has come back with a decision that affects what Bonneville has already done.

Ms. HESSE. Generally that's the case.

Senator EVANS. I am not quite sure what would happen if they did. With these long retrospective periods, it would be almost an unscrambling of an egg to put things right.

Is there any way of being involved, or to what degree are you involved in the process as they go through it? It's been an extensive process in the current rate case, which is now coming to its conclusion. But it has been at least a year, I would guess, in the total development of the rate case.

Is there anything you can do or that you currently do during the development of that rate case that would give you a head start on whatever approval or comments you have to make?

Ms. HESSE. We do not participate in the development of rates for Bonneville.

Senator EVANS. No, I understand. But do any of your staff or do you follow it closely enough or have the information in hand at the time that the final rate is put out by Bonneville so that you can move promptly on your responsibility?

Ms. HESSE. We do have people that follow the process, staff that follows the process, so that by the time a rate case is filed we are generally familiar with it.

Senator EVANS. Do you have any anticipation, given the interventions and the other things that are allowed by law, what would in your view be the minimum time from the moment a rate was issued to a FERC decision?

Ms. HESSE. I think presuming no interventions, I would say maybe six months. It would take us probably that long to review the record.

Senator EVANS. And if there were interventions, that would add how much time?

Ms. HESSE. Years.

Senator EVANS. Have we ever gotten by without an intervention?

Ms. HESSE. Not that I'm aware of. But I'll check and supply that for the record.

[The information follows:]

Since the enactment of the Northwest Power Act, the Commission has never received a BPA rate filing for review without intervention by interested parties.

Senator EVANS. That would be nice to know.

Let me turn to PURPA. You mentioned on page 13 of your statement, or on several pages beginning on page 13 or the bottom of page 12, "The first general area we will focus on will be PURPA, and in general the role of independent power producers."

Do you have any current statement as to how you think we ought to review PURPA or what you see as the problems in the current law or in the carrying out of the PURPA Act and what directions you might pursue in terms of any change?

Ms. HESSE. Senator, we held four regional conferences around the country earlier this year to discuss PURPA. I think the general consensus is that legislative change probably is not required, but that regulatory change is required.

We are in the process of developing some proposals to change our regulations that would permit, we hope, a more effective environment in which PURPA may operate. We're looking at the concept of bidding for example. This bidding would include not only co-generation facilities and small power producers, but the utilities' own construction program perhaps as well.

We are also thinking about expanding the list or the universe of potential bidders by including independent power producers. Some examples of those would be utilities, for example, not in their own sphere of economic influence or a third party entrepreneur or engineering firms. It may be that by including them in the bidding process, that we will really create a competitive market.

Senator EVANS. Do you feel that there is currently a problem at all in an independent producer under PURPA requiring a utility to purchase the power they produce at excessive prices, excessive as far as the utility is concerned?

Ms. HESSE. I think that there is the belief among utilities in various regions of the country that that is the case.

Senator EVANS. You indicate that you don't believe that there is any need for legislative change in PURPA, but merely regulatory change. Do you believe that, in the first place, that is a real problem? Do you or does FERC view that as a real problem? And if so, can you correct it through regulatory activities, or would that require some kind of legislative change?

Ms. HESSE. I think there are instances in some states where the avoided cost rates may be set too high, and that the utilities do in fact pay more than they can afford to pay, or perhaps than they should pay. I think that FERC has a responsibility to fix that if we can fix that. If we can fix that, we will.

Senator EVANS. Would this be a reasonable theory, that if a utility has no capacity or energy requirements, currently or as far as they can tell, for a substantial future period of time, wouldn't their avoided costs under those circumstances be zero?

Ms. HESSE. Well, I think that given that scenario, yes. But I think that every utility in the country is going to have to have new capacity at some point, either to meet increased load or to replace existing capacity that should be retired.

Senator EVANS. What about utilities who say, we're looking a long, long term into the future, the rest of the century and into the beginning of the next century, and find that internally generated deficiencies, conservation, load management, all of the other non-generating activities, are sufficient to handle our problems? Under those circumstances, should they be required to accept power at whatever price from an independent producer under PURPA?

Ms. HESSE. My own opinion is that the utility should have some flexibility in determining whether or not it must pay for that capacity. But we do have a law that says that utilities must purchase that capacity.

Senator EVANS. That's what I'm getting at. You had indicated you didn't think there was any need for a change in the law. Now you're saying there is a law that prevents us from doing that. Should we be taking a look at whether we need to modify that portion of the law?

Ms. HESSE. I think that probably in the best of all possible worlds that we might suggest that the statute needs to be changed. But I think that we believe that through regulatory change that we can correct the most major problems with PURPA and not require legislative change.

Senator EVANS. Have you gone far enough in that field to have had any draft ideas, papers, analyses, anything that you can share with the committee on proposed changes in legislation that might resolve these problems, so that we in turn might be spared the necessity of looking at changes in legislation?

Ms. HESSE. Certainly, Senator. We do have a number of draft documents, which I will be pleased to submit to you for the record.

[The information follows:]

There are two documents at this time that respond to your request. These two documents, which have been prepared by the Commission Staff, are protected from public disclosure under the Government's deliberative process privilege which is incorporated into exemption five of the Freedom of Information Act, 5 U.S.C.

§ 5526(b)(5) (1982). To protect the documents from disclosure, they are being submitted to the committee under separate cover. The Commission requests that the documents not be disclosed and that they not be incorporated into the hearing record.

Senator EVANS. That would be helpful if you could. Let me briefly turn then to transmission access. You mentioned, but only briefly,—I think the only thing in your paper says, "The second area is transmission pricing and access. Transmission obviously is a key and a very complex factor in moving toward market solutions."

As you probably know very well, we have significant transmission access problems in the northwest, particularly as it relates to access to transmission by Canadian power coming through the northwest to other destinations, access to the intertie between the northwest and the southwest. Who gets access through various transmission lines owned say by Bonneville, or even in the southwest, owned by various utilities which deny access to their transmission lines to other utilities close by.

Do you have any comments at this point on FERC's philosophy, policy? What are you aiming toward in terms of transmission access? You tantalize us with the two sentences, but tell us little about what FERC's ideas are, or your ideas.

Ms. HESSE. I think at this point we don't have any ideas. We are in the process of developing a strategy and a policy concerning transmission, and that is a policy I would say is probably at least six or seven months in the future.

But I did want to at least acknowledge that it is something that we are at least going to look at and we are thinking about.

Senator EVANS. There too, do you have any current information that would be useful or that has developed to the point where it would be useful for the committee's perusal?

Ms. HESSE. Senator, I think that we do not have any information in a developed way that we could submit for the record to help on this point. But I will assure you that as soon as we do, I'll make certain you get that.

Senator EVANS. Good. Thanks very much.

A final question relates to the Electric Consumer Protection Act, which we passed last fall. Could you generally tell us how you think that it's working? Have you really had any opportunities yet to specifically run a license through the process? Or is it too early to have had any of that done?

Ms. HESSE. No, it's not too early. We have in fact run many licenses through the process. We did I think actually a month or so after it was in effect.

Senator EVANS. Were these ones that had been pending for some time and were then released by the law itself?

Ms. HESSE. Well, not necessarily released by the law itself. They had been pending for some time.

Senator EVANS. I mean, did it make it easier to go through?

Ms. HESSE. Yes. They were at the point that we were almost finished with processing. So what was required was for us to go back and review the processing based on the requirements of the law.

I think that we believe that it is possible, and in fact, relatively easy to process cases through ECPA, that it has given us an opportunity to look at new issues and to take under consideration new variables, such as equal consideration. It is possible for us, with

some effort I would say, to balance the competing interests between development and the environment.

Senator EVANS. There were new environmental and fish and wildlife interests specified in the law. Were you able to take those fully into account with the licenses that you say have been run through promptly after the passage of the law? Have they had all of the information available at that point? How were those new ones——

Ms. HESSE. Those that we have processed of course had all of the information available, and we were able to process them.

Senator EVANS. What about relicensing? The new law, at least philosophically, emphasized a shorter license period rather than a longer one, under the fundamental belief that about once every generation we should have an opportunity to rethink and relook at water use. What has been the typical FERC response in terms of length of license for relicensing projects?

Ms. HESSE. I think that I would say that it is multiple years. It probably ranges anywhere from perhaps two to five years. We are facing in the next decade the relicensing of most of the major dams in the country.

Senator EVANS. I'm not talking about the length of time it takes to relicense. I'm talking about the length of the new license.

Ms. HESSE. Oh, the length of the new license. That's about 30 to 50 years.

Senator EVANS. I know it's 30 to 50 years. It had been essentially 50, and now it's 30 to 50. But the emphasis, at least as far as this Senator and I think a good many Senators were concerned, was that whenever we could we ought to license for the shorter time rather than the longer time to give each generation at least another shot at taking a look at water use and water priorities.

Could you tell us, maybe for the record, the length of license on relicense projects that have been issued subsequent to the passage of the law or that have been issued under the new law so we can get some sense of just what is happening in terms of relicensing projects?

Ms. HESSE. I'll submit that for the record.

[The information follows:]

Section 15(e) of the Federal Power Act as amended by the Electric Consumers Protection Act of 1986 (ECPA) requires the length of relicense terms to be "not less than 30 years, nor more than 50 years from the date on which the license is issued." Prior to ECPA, Commission policy in setting the terms of relicenses established 30-year terms for those projects which proposed no new construction or capacity, 40-year terms for those projects which proposed a moderate amount of new development, and 50-year terms for those projects that proposed a substantial amount of new development. Although no relicenses have yet been issued subsequent to the passage of ECPA, we expect this policy to continue.

Senator EVANS. Finally, page 17. The last page, so the last question.

You said, "Indeed, as I mentioned earlier, the pending hydropower applications have been reduced by nearly 20 percent since I arrived." That is a greatly to be desired goal, and I applaud that accomplishment. I expect there is still a backlog to get at. Twenty percent is a pretty good accomplishment in a relatively short period of time.

I'm just curious as to how that was accomplished: by approving the applications, by denying a whole bunch that had been hanging around? What has really happened to that 20 percent that has been reduced?

Ms. HESSE. I would also like to say that as of today, we relooked at the numbers and it's over 30 percent.

Senator EVANS. That's terrific.

Ms. HESSE. I can assure you that we did not play games with the numbers and either reject a lot of applications or just go ahead and approve a lot.

What we did was take a look at our procedures for processing applications. We found that in many cases we had duplicate procedures, that we had multiple reviews when multiple reviews weren't necessary, that we did not delegate authority to the lowest possible level. We have reviewed our procedures, changed them, and found that we can in fact hurry up and get through the backlog.

That is only so much to say that there are a lot of dedicated people that have worked long and hard hours to make certain this has happened. It's not as easy as I make it sound.

Senator EVANS. I congratulate you on that accomplishment.

I hope you will take that congratulations back to all those who have helped make it happen. I think the most frustrating thing in the world is for citizens to not get an answer out of government. Even a negative answer is better than no answer at all. So I think that is a very fine accomplishment, and I applaud you for it.

Ms. HESSE. Thank you, sir.

Senator EVANS. Thank you, Mr. Chairman.

Senator FORD. Thank you. I might say to my good friend from Washington, when you talk about hydro relicensing and you get into 30's and 50's, this Senator looks at the long-term, not the short-term.

There are two other Senators who have statements for the record, Senator Nickles from Oklahoma and Senator McClure from Idaho. I ask unanimous consent that both statements be included in the record.

[The prepared statements of Senator Nickles and Senator McClure follow:]

STATEMENT OF SENATOR DON NICKLES

HEARING TO CONSIDER THE NOMINATION OF
MARTHA O. HESSE TO BE CHAIRMAN
OF THE FEDERAL ENERGY REGULATORY COMMISSION

JULY 9, 1987

MR. CHAIRMAN:

I AM PLEASED THAT WE HAVE THE OPPORTUNITY TO RECONFIRM THE FEDERAL ENERGY REGULATORY COMMISSION'S CURRENT ABLE CHAIRMAN, MARTHA O. HESSE. I AM PARTICULARLY IMPRESSED BY HER ACTIVE LEADERSHIP IN TRYING TO CREATE A FLEXIBLE, MARKET-DRIVEN NATURAL GAS INDUSTRY.

THE TRANSITION FROM SUFFOCATING AND INEFFICIENT FEDERAL OVER-REGULATION HAS BEEN, AS WOULD BE EXPECTED WITH SUCH A MAJOR AND DIVERSE INDUSTRY, A DIFFICULT ONE. AND THE TRANSITION IS CERTAINLY NOT OVER. WE ALL SHOULD BE THANKFUL THAT CHAIRMAN HESSE HAS AGREED TO SERVE AN ADDITIONAL TERM TO SEE THROUGH THE MANY INITIATIVES THAT THE COMMISSION HAS UNDERTAKEN DURING HER CURRENT TERM.

I AM OPTIMISTIC THAT ONCE THIS TRANSITION IS COMPLETED, THE NEW NATURAL GAS MARKET PLACE WILL BENEFIT CONSUMERS BY ASSURING THEM THE MAXIMUM QUANTITIES OF NATURAL GAS AT THE LOWEST REASONABLE PRICES. NATURAL GAS PRODUCERS IN OKLAHOMA AND THE OTHER PRODUCING STATES, TOO, WILL BENEFIT FROM THE NEW MARKETPLACE. THEY WILL HAVE MORE MARKETS TO SELL THEIR GAS TO, AND NEW INCENTIVES TO INCREASE PRODUCTION OF THE LOWEST COST GAS SUPPLIES.

MOREOVER, A STRONGER NATURAL GAS INDUSTRY, WITH INCREASED NATURAL GAS CONSUMPTION DUE TO LOWER PRICES, WILL DISPLACE IMPORTED PETROLEUM, THUS IMPROVING OUR BALANCE OF PAYMENTS AND DECREASING OUR VULNERABILITY TO THE NEXT OIL PRICE SHOCK. MORE DOMESTIC ENERGY PRODUCTION WILL ALSO PROVIDE INCREASED DOMESTIC EMPLOYMENT AND FEDERAL AND STATE TAX REVENUES.

IN SUMMARY MR. CHAIRMAN, I APPLAUD THE DIRECTION THAT CHAIRMAN HESSE HAS CHARTED FOR THE COMMISSION, AND APPRECIATE HER WILLINGNESS TO CONTINUE AT THE HELM TO SEE HER INITIATIVES THROUGH. THIS COUNTRY NEEDS TO GET PAST THIS TRANSITION PERIOD AND INTO A STABLE MARKETPLACE FREE OF UNNECESSARY FEDERAL INTERFERENCE.

Statement of Senator McClure

July 10, 1987

Nomination Hearing of Martha O. Hesse to be
a member of the Federal Energy Regulatory Commission

I would like to welcome you to the Committee once again, Ms. Hesse. You have had numerous occasions to appear before this Committee since your last confirmation hearing in September of 1986. Your testimony has been forthcoming and cooperative in every respect. I now look forward to working with you during your second term as Chairman of the Federal Energy Regulatory Commission.

Under your leadership, the past ten months have been a particularly active period at FERC. Numerous and controversial natural gas issues have been considered during this time. In addition, you have undertaken the tasks of expediting procedures at the Commission as well as improving the administrative policies and staff productivity.

Mr. Chairman, I believe that Ms. Hesse's record speaks for itself. I take this opportunity to publicly express my enthusiastic endorsement of her reconfirmation as a member of the Federal Energy Regulatory Commission and subsequent reappointment as its Chairman.

Senator FORD. Madame Chairman, since we're on generating utilities, electrical facilities, let me ask a question. There are a couple of words in here—one has nine letters, the other has twelve. When you get beyond four, this Senator has a lot of trouble. So you bear with me.

Would you describe for me the state of law concerning the pass through of wholesale power costs and retail electric rates? Let me tell you why I ask that question. Last year in the Nantahalla case, the Supreme Court reaffirmed the Narragansett Doctrine and held the state commissions may not look into the composition of a FERC-approved rate for purposes of pass through in retail rates.

However, the Court left open the question of whether a state commission may disallow pass through on prudence grounds. Recently the Mississippi Supreme Court did just that, and disallowed the pass through of costs for the Grand Gulf nuclear unit in retail rates of Mississippi Power and like companies, on the grounds that contracts to purchase Grand Gulf power were imprudent.

That case, of course, is complicated by the fact that it takes place in the context of an integrated public utility holding system. In any case, what are your general views on the power of states to disallow pass through wholesale rates on prudence grounds?

Ms. HESSE. Senator, it is my understanding that the wholesale rates that the Commission approves are in fact the rates that must be passed through on a wholesale basis by the states.

I think that on the question of prudence, the Commission, as a Commission, is very interested in questions of prudence, and we do in fact conduct our own prudence investigations on wholesale costs. I would expect that our judgments, based on prudent cost, would be accepted by the state commissions. But I do realize that the state commissions can in some circumstances, regardless of what the Federal commission does, look into the purchasing practices and the contracts at the local level.

Senator FORD. I'm ticklish, and they're punching me in the ribs back here, Madame Chairman.

We're honored with the presence of the distinguished majority leader, who would like to make a statement. I would like to recognize him at this time for that statement. Senator Byrd.

Senator BYRD. Mr. Chairman, I thank you. I wonder if I'm imposing on the time of my Republican friend.

Senator EVANS. Not at all. I've already had a chance to ask my questions.

STATEMENT OF HON. ROBERT C. BYRD, A U.S. SENATOR FROM THE STATE OF WEST VIRGINIA

Senator BYRD. Mr. Chairman, I thank you for what I consider to be an interruption, for me a pleasant one, and I'll be very brief.

I thank you for allowing me the opportunity to express my support for the confirmation of Martha O. Hesse for a second term as a member of the Federal Energy Regulatory Commission. She will also be renamed as Chairman of that important regulatory agency.

Chairman Hesse has already succeeded in bringing a new vitality to a regulatory body that has too often been lethargic in its per-

formance, and at times indifferent to the major issues affecting the reliability of our nation's natural gas and electric energy supplies.

Her leadership has been aggressive and innovative. She has utilized her management skills to improve staff productivity, and to expedite administrative procedures. She has undertaken a difficult task with an eagerness and a dedication that warrant our support.

I enthusiastically and I unqualifiedly endorse Martha O. Hesse as the President's nominee for the Federal Energy Regulatory Commission. I thank you, Mr. Chairman. I thank you, gentlemen on the committee.

Ms. HESSE. Thank you, Senator.

Senator BYRD. Thank you very much.

Senator FORD. Thank you, Senator Byrd.

I have a couple of more questions, Madame Chairman, that I would like to visit with you on. You have indicated that the Commission intends to issue an interim natural gas transportation rule pending notice and comment procedures on a new final rule. Could you explain for the committee what you intend to do procedurally to tie your transportation rulemaking and your take-or-pay rulemaking together?

Ms. HESSE. As you know, Senator, the court vacated and remanded Order No. 436 to the Commission. We have a number of procedural options available to us, to fix Order No. 436 and to promulgate a new rule.

We have decided as a Commission that we would put forth an interim rule which would take effect immediately, but would also be subject to comment and change before we actually put forward a final rule.

We intend, in this interim rule, to address the issues that the court suggested that we address, which includes the contract demand adjustment provisions as well as take-or-pay.

Senator FORD. Well, the court strongly suggested, without mandating it, that the Commission require producers to resolve take-or-pay claims before they were allowed access to transportation under rule 436. Is that what you're talking about?

Ms. HESSE. Senator, I think that we are looking at that. We are looking at the court's instructions and suggestions. I have always thought that take-or-pay should have a time horizon, and that we should talk about yesterday's take-or-pay as well as the future.

Conditioning access to transportation would probably be a part of both, although we do think that for future take-or-pay that we would like to pursue some sort of a reservation fee, and for past take-or-pay of course we need to have settlements from producers and from pipeline before the Commission can implement a policy.

Senator FORD. In your statement you indicate that you intend to deal with the problem of aborting the future take-or-pay problems by I guess instituting mechanisms whereby parties who desire firm supply service will pay for the value of that service?

Ms. HESSE. That's correct.

Senator FORD. And the cost of the gas inventory behind it. How would that work?

Ms. HESSE. I think that although we are yet in the developmental stages, that we would suggest that if a local distribution company wishes to reserve long-term supply, as they do now, that there

would be a fee for that and that they would pay the pipelines to reserve that supply. It would be a carrying charge, for example.

No, I cannot give you the exact formulation of the reservation fee, or even a range in price. But it's something that we are looking at and that we will be prepared to discuss sometime in the next couple of weeks.

Senator FORD. Well, there are a great deal of take-or-pay liabilities that could continue to mount under existing non- expiring contracts. That will be something you will have to deal with too, will it not?

Ms. HESSE. Absolutely.

Senator FORD. Mr. Chairman, that's all the questions I have. Senator Wirth is next in line. Then Senator Murkowski.

The CHAIRMAN [presiding]. Senator Wirth.

Senator FORD. I'll be glad to turn this over to you now.

STATEMENT OF HON. TIMOTHY E. WIRTH, U.S. SENATOR FROM THE STATE OF COLORADO

Senator WIRTH. Thank you very much, Mr. Chairman.

Thank you, Ms. Hesse, for being with us today. Mr. Chairman, I have a long two-and-a-half hour statement describing the changes in the industry and the challenges faced by the Commission and the distinguished job done by Ms. Hesse, but I'll spare you that if you give me unanimous consent to have it put in the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Wirth follows:]

STATEMENT OF THE HONORABLE
TIMOTHY E. WIRTH

July 9, 1987

Mr. Chairman, I want to thank you for scheduling hearings on the President's nomination of Martha Hesse to be the Chairman of the Federal Energy Regulatory Commission.

The last few years have been difficult ones for many parts of the nation's energy infrastructure. That is particularly true for producers and distributors of natural gas, and for electrical utilities. Both of these industries face fiscal and economic environments very different from those of just a few years ago. And both are vital to a strong, competitive economy.

One of the Commission's greatest challenges is to find a balance between promoting adequate, reliable supplies of energy, ensuring a strong, competitive market place, and ensuring that the pipeline companies and electrical utilities are able to earn a fair return on their investments. That balance is not easy to discern, Mr. Chairman. The Congress has delegated to the Federal Energy Regulatory Commission a difficult, but very important assignment.

In her brief tenure at the Commission, Martha Hesse has established a strong track record. Under her leadership, the

Commission is working to eliminate a backlog of decisions on some crucial issues, ranging from open access transportation to the role of cogeneration resources as part of the electrical energy grid.

The Federal Energy Regulatory Commission is a tough place to win a popularity contest, Mr. Chairman. But from what I have observed, Ms. Hesse's nomination is enthusiastically supported by the interstate pipelines, producers, electrical utilities, the Administration, and many members of this Committee.

I think that Ms. Hesse has done a good job as chairman at the Commission, and I am pleased that the President has nominated her to a full term as chairman. I look forward to working with her over the coming years on the very important issues that affect the nation's energy industry.

At the same time, Mr. Chairman, I have some questions about the Commission's decision in Order 436. While this decision will spark a new era of competition in the natural gas industry, and while I support the decision as far as it goes, I believe that the Commission erred in not addressing several key issues -- the same issues that prompted the Court of Appeals for the District of Columbia to remand Order 436 to the Commission. Upon remand, I hope that the Commission will address the interrelated questions of contract demand reduction and take-or-pay contracts. These issues simply can not be divorced from the other elements of Order 436, and the entire set of issues should be addressed, and resolved, as part of the same rulemaking.

Senator WIRTH. Thank you very much, Mr. Chairman.

Ms. Hesse, as you know, Colorado Interstate Gas, like other pipelines, has had some significant problems with the take or pay issue and the 436 program. You're more than familiar with that, and we're delighted that you were there and embroiled in that as deeply as you are.

I have a couple of questions related to that, which I will spare you at this time. But might I, Mr. Chairman, have the committee transmit those to Ms. Hesse and the Commission? Perhaps we could ask you for an expeditious response to those.

I know this is an issue in which you are all deeply ensnarled and will be for some time. But I wanted to add my hope that you would be addressing this take or pay issue and the role of the pipelines as quickly as possible.

Ms. HESSE. You have my word.

The CHAIRMAN. There will be other written questions as well. I'd like to reserve that right on behalf of all committee members, that they be able to submit to you questions in writing.

Senator WIRTH. Thank you, Mr. Chairman. Ms. Hesse, we appreciate the job you have done and want to congratulate you for the job that you have done, not only for taking on such a difficult one. The first job is always complicated and what you win in Chicago you loose in Philadelphia. I know that, but you've done a very good job and we appreciate it. We thank you very much for your good service to this industry and to the country.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Wirth.

Senator MELCHER. Excuse me. Senator Murkowski was next.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Ms. Hesse, I too want to join with my colleagues in welcoming you again in another tenure as Chairman of FERC. It's an extraordinary agency. You have a better appreciation of that than I. We appreciate the time and dedication of you and your associates, oftentimes on issues affecting my state.

As you know, we have been blessed with an abundance of energy, most of which is owned by the Federal government directly or indirectly inasmuch as the Department of the Interior is the steward for that land. The basis of development, more often than not, comes through FERC.

It is certainly going to be a pleasure to maintain the continuity of friendship and contact that we have enjoyed, and I look forward to that continuing as you continue your duties as Chairman.

If I may reflect on a matter that FERC has recently addressed with regard to the issue of jurisdiction over the proposed Trans Alaska Gas System, or the TAGS Pipeline. It is my understanding that FERC recently issued a decision with regard to jurisdiction over that project. I guess it is fair to say that there is some question or disagreement about the extent of FERC's jurisdiction over processing facilities vis-a-vis the pipeline, and so forth.

I'm wondering if you are at liberty to share with me offhand, or whether you would prefer to for the record respond to that gray area that appears to one who reads the decision to be in existence.

Ms. HESSE. Senator, I prefer to submit a legal analysis for the record.

Senator MURKOWSKI. I would respectfully ask that your legal analysis attempt somehow to address the issue of what the statement that's in the summary refers to when it says it does have, "some jurisdiction". That leaves it open for a very broad interpretation. I assume that, Mr. Chairman, the record will remain open for a sufficient time to allow the Chairman to address that question. I would appreciate it if you could instruct your counsels to do it in such a way so that it is quite clear as to whatever the meaning that is intended by FERC is so that we wouldn't have to ask for clarification of the wording.

Ms. HESSE. I will make certain of that.

[The information follows:]

(Request for legal analysis clarifying FERC jurisdiction over the proposed Trans-Alaska Gas System)

On May 27, 1987, in response to a petition filed by Yukon Pacific Corporation, the Commission issued a declaratory order which sets forth the Commission's determination of its jurisdiction under the Natural Gas Act over the Trans-Alaska Gas System, including the legal analysis and factual predicates upon which its determination of jurisdiction is based. A copy of the Commission's declaratory order is attached.

The Commission is scheduled at its next public meeting to address petitions for rehearing of the Commission's May 27 order.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

JURISDICTION

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

Yukon Pacific Corporation) Docket No. GP87-16-000

DECLARATORY ORDER

(Issued May 27, 1987)

On December 18, 1986, Yukon Pacific Corporation filed a petition for a declaratory order. Yukon Pacific has formulated a proposal to construct and operate a natural gas pipeline to transport gas from the North Slope of Alaska at Prudhoe Bay to the tidewater coast of Alaska at Valdez, for the purpose of exporting Alaskan North Slope gas to Asian markets. The pipeline, to be known as the Trans-Alaska Gas System (TAGS), would be constructed entirely in one state (Alaska), with a gas liquefaction plant at Valdez to liquefy the gas for transportation by ship to market across the Pacific.

Yukon Pacific is currently in the process of arranging financing for the project. To assist it in that effort, by narrowing the potential range of legal issues pertinent to the project, Yukon Pacific has requested a declaratory order from the Commission determining whether the Commission has jurisdiction over the project under sections 3 and/or 7 of the Natural Gas Act (NGA), 15 U.S.C. §717b and §717f.

I. The Project

In its petition (at pp. 1-3), Yukon Pacific describes TAGS as follows:

> Yukon Pacific is an investor-owned corporation organized under the laws of the State of Alaska. Its principal place of business is Anchorage, Alaska.
>
> * * *
>
> Yukon Pacific has been formed to construct, operate, and maintain the Trans-Alaska Gas System (TAGS). As proposed, TAGS will consist of (i) a 796.5 mile, buried, chilled, intrastate natural gas pipeline which will have a 36-inch outside diameter and is designed to transport 2.3 billion cubic feet of gas per day from the North Slope of Alaska to a tidewater site in Port Valdez, Alaska;

(ii) ten compressor stations located along the pipeline to maintain operating pressures between 1,100 to 2,200 psig, and to maintain operating temperatures compatible with ground temperatures; (iii) a liquefied natural gas (LNG) plant designed to reduce the temperature of the gas to minus 259° fahrenheit (minus 161° centigrade), condensing it to a liquid state for storage and shipping; (iv) a marine terminal to simultaneously berth and load two LNG tankers, plus support vessels; and (v) associated LNG tankers for the export of the gas to Asian markets. The proposed TAGS Project does not currently include development of a natural gas conditioning facility on the North Slope. Responsibility for construction and operation of gas conditioning facilities, if necessary, will be the subject of future negotiations between Yukon Pacific and North Slope gas producers.

The TAGS pipeline, and all appurtenant facilities, will be located wholly within the state boundaries of Alaska. Moreover, all of the natural gas that flows through TAGS will be exported exclusively into foreign commerce and will not reach markets in the State of Hawaii or the lower 48 states. Yukon Pacific has not, as yet, constructed any facilities, but has applied for a federal right-of-way permit for the pipeline and marketing efforts are underway for the sale of LNG in Asia. . .

II. Interventions

Notice of Yukon Pacific's petition was issued on December 30, 1986, and was published in the Federal Register on January 7, 1987 (52 Fed. Reg. 587). Timely motions to intervene were filed by Alaskan Northwest Natural Gas Transportation Company (Alaskan Northwest), Foothills Pipe Lines (Yukon) Ltd. (Foothills), Northern Border Pipeline Company, Pacific Gas Transmission Company (PGT) and its affiliate Pacific Gas and Electric Company (PG&E) (jointly), and the State of Alaska. Yukon Pacific filed a set of answers in opposition to the motions to intervene of Alaskan Northwest, Foothills, Northern Border, and PGT and PG&E, arguing that these four intervenors have not demonstrated that they have an interest in the proceeding which may be directly affected by the outcome, or that their participation would be in the public interest.

Alaskan Northwest, Foothills, PGT and Northern Border are the project sponsors of the Alaskan Natural Gas Transportation System (the ANGTS), a pipeline system designed to transport gas from the North Slope of Alaska to the lower-48 states. Pursuant to legislation discussed below, Alaskan Northwest holds a conditional certificate to construct the segment of the ANGTS in Alaska, including a gas conditioning plant on the North Slope. That segment has not yet been constructed and is presently in abeyance. Foothills is the project sponsor of the Canadian segment. The lower portion of that segment has been constructed while the upper portion is presently in abeyance. Northern Border and PGT hold conditional certificates for the segments of the ANGTS in the lower-48 states, substantial portions of which have been constructed.

Alaskan Northwest and Foothills have submitted lengthy and detailed answers to Yukon Pacific's petition. Generally, they urge us to dismiss the petition or hold it in abeyance, on grounds that TAGS is in an early stage of development with many factual uncertainties. In the alternative, they urge us to set the matter for an evidentiary hearing. In the further alternative, they urge us to assert jurisdiction under both section 3 and section 7 of the NGA. Northern Border, in its motion to intervene, adopts by reference the views expressed by Alaskan Northwest.

Alaskan Northwest, Foothills, Northern Border and PGT, as the project sponsors of the ANGTS, clearly have an interest in the outcome of this proceeding. Moreover, in light of the Presidential and Congressional actions underlying or associated with their authority to construct and operate the ANGTS, their participation in this proceeding is clearly in the public interest. They should be accorded full opportunity to express their views, and the Commission should have the benefit of those views in considering the intricate legal issues framed by the pleadings. Accordingly, the contested motions to intervene will be granted.

The State of Alaska, in its motion to intervene, urges the Commission to grant Yukon Pacific's petition, as a means of reducing potential regulatory burdens on the proposed project. 1/

1/ In its motion to intervene, Alaska made reference to the possibility of submitting more specific comments at a later date. Counsel for Alaska subsequently advised the Commission that it did not intend to file additional comments. Alaska's timely, unopposed motion to intervene is granted by operation of Rule 214 of the Commission's procedural regulations.

Pacific Interstate Transmission Co. (PIT), Southern California Gas Co. (SoCal), Tennessee Gas Pipeline Co., a Division of Tenneco Inc. (Tennessee), and the Public Utilities Commission of the State of California (California PUC) filed motions to intervene out of time. Yukon Pacific filed short answers opposing those interventions, incorporating by reference its answer to Alaskan Northwest's intervention, discussed and resolved above. Grant of these late motions to intervene will not delay or disrupt the proceeding or prejudice any party to it. Accordingly, these motions to intervene will also be granted.

III. Is the Application Ripe?

Alaskan Northwest and Foothills point to numerous uncertainties in Yukon Pacific's application, including the identity of specific markets for the gas, the identity of specific sources of the gas to be exported, and the nature and identity of the gas conditioning facilities at the North Slope, and the relationship of all of these factors, and of TAGS generally, to the ANGTS. Yukon Pacific, on the other hand, stresses that clarification of its jurisdictional status will assist it in arranging financing, by narrowing the range of uncertainties inherent in the development of a project of this magnitude.

We note at the outset that what we have before us today is not an application for a certificate but an application for a declaratory order on our jurisdiction. Jurisdiction is a threshold question. While any determination of jurisdiction, or lack thereof, must necessarily be premised on the facts of the case, or at least on factual predicates, issuance of a declaratory order does not have either the finality or the consequences of issuance of a certificate.

If at any time facts are brought to the attention of the forum indicating that it lacks jurisdiction over a case, it must cease its proceedings and dismiss the case. Conversely, if at any time the facts indicate that the forum does have jurisdiction, prior determinations to the contrary do not relieve the forum of its statutory duty to perform its jurisdictional responsibilities. Thus, any determination we make today can only be valid within the parameters of the facts and factual predicates before us at this time. Should there be any material change in those facts, such changes could well affect our jurisdiction, necessitating further orders on the subject.

As outlined by Alaskan Northwest and Foothills in their pleadings, the TAGS project has evolved over time. Based on past experience (including the evolution of the ANGTS itself), we anticipate that the TAGS proposal may continue to evolve. From the application before us, it is indeed unclear what specific sources of gas will be exported, and to whom; Yukon Pacific has

not yet reached the stage of negotiating specific gas purchase and sales contracts. It is also not clear whether the gas conditioning plant proposed to be used by the TAGS sponsors is the same plant for which the ANGTS sponsors have already received a conditional certificate under section 7 of the NGA, or whether it is a different and totally unrelated plant. If we had jurisdiction to certificate the project, such factual uncertainties would necessarily mandate an evidentiary hearing before issuance of a certificate could be considered. We do not, however, believe that any useful purpose would be served by setting the Yukon Pacific petition for hearing at this early stage of TAGS' development when the TAGS sponsors are themselves still working out the facts pertinent to their project.

Although we are not in a position today to render a definitive determination of our jurisdiction that will be binding for all time regardless of how the TAGS project evolves, we do believe that a useful purpose would be served by outlining the potential parameters of our jurisdiction based on the facts presented in the pleadings, and based on factual predicates in those situations where the facts may change or are as yet unclear. Such a ruling will not provide the TAGS sponsors with a definitive assertion or disavowal of jurisdiction, but it may well provide a measure of guidance that will narrow the range of uncertainties and assist Yukon Pacific in further formulation of its project. It may also facilitate and expedite regulatory review of the project as it ripens, by clarifying the role of the Commission in the enviromental review processes.

IV. The Relationship of TAGS to the ANGTS

Yukon Pacific, in its application, asks us in effect to analyze our jurisdiction over TAGS as a project standing alone, by itself, unrelated to any other project in Alaska. Further, the only statute that Yukon Pacific has asked us to address in determining our jurisdiction over TAGS is the Natural Gas Act. Alaskan Northwest and Foothills, on the other hand, cite and discuss at length the unique legal history of the ANGTS, and contend, in effect, that our determinations with respect to TAGS must be made in the context of the ANGTS legal framework. In order to consider those arguments, we start by briefly outlining some of the legal enactments pertinent to the ANGTS.

Pursuant to section 7 of the Alaska Natural Gas Transportation Act of 1976 (ANGTA), 2/ President Carter issued his Decision and Report to Congress on the Alaska Natural Gas Transportation System

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2/ 15 U.S.C. § 719 et. seq.

(President's Decision), 3/ designating the route and project sponsors for the ANGTS, and Congress approved those determinations by Joint Resolution. 4/ Subsequently, pursuant to section 8(g) of ANGTA, President Reagan submitted a Waiver of certain provisions of law (President's Waiver of Law), 5/ in an effort to assist the financing and construction of the ANGTS, and that Waiver was also approved by Joint Resolution of Congress. 6/

Section 9 of ANGTA mandates that all federal agencies having jurisdiction over the ANGTS expedite their regulatory activities with respect to it. Section 9 also prohibits such agencies from changing "the basic nature and general route of the approved transportation system" [i.e., the ANGTS], or taking other regulatory action that "would otherwise prevent or impair in any significant respect the expeditious construction and initial operation of such transportation system."

Reorganization Plan No. 1 of 1979, which was submitted by the President to the Congress and not disapproved by the Congress, established the Office of the Federal Inspector, which reports directly to the President. The Inspector is responsible for monitoring the construction of the ANGTS, and for coordinating all federal permitting and certification of it. The Plan transferred to the Inspector the Commission's NGA section 3 and 7 jurisdiction to enforce the Commission's certificates and import authorizations issued to the ANGTS project sponsors.

The ANGTS is also governed by two international agreements with Canada, both of which have the force and effect of law. The "Agreement Between the Goverment of the United States of America

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3/ Executive Office of the President, Energy Policy and Planning, September 1977. See Midwestern Gas Transportation Co. v. F.E.R.C., 589 F.2d 603 (D.C. Cir. 1978).

4/ H.R.J. Res. 621, Pub. L. No. 95-158, 91 Stat. 1268, 95th Cong., 1st Sess. (1977).

5/ Findings and Proposed Waiver of Law, October 15, 1981, reprinted at H.R. Rep. No. 350, 97th Cong., 1st Sess. 25 (1981).

6/ S.J. Res. 115, Pub. L. 97-93, 95 Stat. 1204 (1981). See Metzenbaum v. F.E.R.C., 675 F.2d 1282 (D.C. Cir. 1982).

and the Government of Canada Concerning Transit Pipelines," 7/ entered in force October 1, 1977 after ratification by the Senate, applies to all pipelines in both countries whenever one country's pipeline carries the other country's gas or oil. The treaty mandates non-discriminatory treatment. The "Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline" (Agreement on Principles), signed by representatives of the two governments on September 20, 1977, is an executive agreement that was made part of the President's Decision (pages 47-83). Inasmuch as the Decision was approved by Congress, it (including the Agreement) has the legal status of a statute. The Agreement specifies the route of the ANGTS, and contains numerous conditions.

Prior to Canada's issuance of regulatory approval for the early construction ("prebuild") of the lower portion of the Canadian segment of the ANGTS, the Congress, in a Concurrent Resolution adopted June 27, 1980, reaffirmed the U.S. commitment to construct the ANGTS. 8/ The ANGTS has also been a subject of correspondence and assurances between the President of the U.S. and the Prime Minister of Canada. 9/

The parties have also drawn our attention to several provisions of U.S. law that are pertinent to the export of natural gas from Alaska. Pursuant to section 3 of the NGA and applicable delegations by the Secretary of Energy (discussed below), the Administrator of the Department of Energy's Economic Regulatory Administration (ERA) has jurisdiction to approve or disapprove the export of Alaskan gas transported by TAGS. In addition, section 12 of ANGTA provides as follows:

> Sec. 12. Any exports of Alaska natural gas shall be subject to the requirements of the Natural Gas Act and section 103 of the Energy Policy and Conservation Act, except that in addition to the requirements of such Acts, before any Alaska natural gas in excess of 1,000 Mcf per day may be exported to any nation other than Canada or Mexico, the President must make and publish an express finding that such exports will not diminish the total quantity or quality nor increase the total price of energy available to the United States.

7/ 28 U.S.T. 7449, T.I.A.S. No. 8720.

8/ S. Con. Res. 104, 96th Cong., 2nd Sess. (1980).

9/ See, e.g., Appendices B, D and E of Foothills' Answer.

Section 103 of the Energy Policy and Conservation Act, cited above in section 12 of ANGTA, also provides for findings by the President with respect to certain exports of natural gas.

Finally, we note that section 109(a)(4) of the Natural Gas Policy Act of 1978 establishes the maximum lawful price for "natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976." With respect to that gas, as so defined, section 208 of the NGPA requires rolled-in pricing under certain circumstances.

Alaskan Northwest and Foothills cite various combinations of these legal provisions in support of their arguments. They contend, for instance, that the North Slope gas to be exported through TAGS has in some meaningful way, either as a matter of law or national policy, been committed or otherwise earmarked for transportation through the ANGTS; that there is only enough gas to support one project; and that TAGS is therefore competitive with the ANGTS. 10/ They also suggest that, under certain circumstances, the northern segment of TAGS might be usable as the first leg of the Alaskan segment of the ANGTS; that Yukon Pacific may be intending to utilize the North Slope gas conditioning plant that Alaskan Northwest holds a conditional certificate to construct and operate as part of the ANGTS; and that the gas might eventually be transported by Yukon Pacific not to Asia but to an LNG terminal on the west coast of the lower-48 states. The overall thrust of their arguments, when woven together, is to the effect that any action by this Commission that serves to expedite, clarify or facilitate the development of TAGS would, to that extent, impair the expeditious construction of the ANGTS, and alter its nature and route, in contravention of the legislation mandating construction of the ANGTS as a vehicle to transport the North Slope gas to market. Alaskan Northwest goes so far as to suggest (quoting Congressional testimony of a former General Counsel of the Department of Energy)

10/ For instance, Alaskan Northwest discusses at some length a 1985 decision of the Federal Inspector denying Yukon Pacific's appeal from an adverse ruling on a Freedom of Information Act request. Yukon Pacific had sought access to ANGTS engineering and design data. In denying the request, the Federal Inspector held that Yukon Pacific is a "competitor" of Alaskan Northwest, and that release of the information would cause "substantial competitive injury" to Alaskan Northwest. See Alaskan Northwest's Answer at 35-36.

that Alaskan North Slope gas cannot be exported absent new legislation in Congress. 11/ Foothills suggests a potential violation of the 1977 Agreement on Principles between the U.S. and Canada. 12/

These arguments pose an obvious dilemma for the Commission. Yukon Pacific has asked only for a declaration of the Commission's jurisdiction under the Natural Gas Act. The issues raised by the intervenors range far beyond the Natural Gas Act, into international agreements and statutory mandates involving other federal officials and agencies (and even potential future legislation). The primary responsibility for interpreting and implementing those other legal and policy mandates resides not in the Commission but in the President, the Congress, the Secretary of State, the Secretary of Energy (and his delegatee, the Administator of ERA), and the Federal Inspector. It would be inappropriate for the Commission to attempt to anticipate what decisions these duly authorized persons and entities might make in the future on matters for which they bear the prime responsibility. 13/

On the other hand, the Commission cannot approach this case in a total vacuum as if the ANGTS and all of its legal mandate didn't exist. In its orders on the ANGTS and related matters, the Commission has always taken into account the mandate of all legal matters relevant to the case before it, including international agreements and other international assurances. 14/

Faced with these various considerations, the Commission concludes as follows. All of the parties agree that, at a minimum, Yukon Pacific will need to obtain statutory approval for its

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11/ Alaskan Northwest's Answer at 38.

12/ Foothills' Answer at 19-20.

13/ Certainly there is an issue as to whether ANGTA and its several legal and diplomatic progeny can be interpreted to preclude authority under the NGA to authorize a project other than the ANGTS for transportation of Alaskan natural gas. Given the complexity of statutory interpretation and the subsequent legal, diplomatic and resulting policy implication of any such legal interpretation, the Commission has decided to defer any attempt to render an opinion on this subject until the President and the Secretary of Energy have the opportunity to address the issue in the context of a formal application to export the Alaskan natural gas.

14/ See, e.g., Order No. 380-A, Elimination of Variable costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions, FERC Statutes & Regulations ¶ 30,584 (1984) at 31,062.

export of the gas from both the President and the Administrator of ERA. We believe it reasonable to assume that other federal officials and agencies with related responsibilities will have an appropriate opportunity to express their views as they pertain to the decision on that fundamental threshold question. To the extent that the Commission has jurisdiction over TAGS under the Natural Gas Act (as discussed below), it would be inappropriate in any event to render any substantive decisions with respect to TAGS pursuant to that jurisdiction unless, and until such time as, all relevant federal officials and agencies had authorized exportation of the gas to be transported through TAGS. At that time, we would have the benefit of the views and decisions of the President, the Department of Energy, and other federal officials with respect to many of the issues raised by Alaskan Northwest and Foothills. And we would, of course, have full opportunity to weigh and consider those issues at that time to the full extent that they have a bearing on whatever substantive decisions are then pending before the Commission.

Thus, at this time, we decline to address any issues beyond the narrow question of jurisdiction under sections 3 and 7 of the Natural Gas Act. 15/ In doing so, we specifically recognize that the issues raised by Alaskan Northwest and Foothills exist, are very important, and have a significant (indeed, fundamental) bearing on the project. We make no assumptions at this time as to how those issues will ultimately be resolved, when, or by whom. For purposes of addressing the narrow, Natural Gas Act questions posed to us, we will proceed as follows: If the responsible federal agencies and officials were to approve the export, what jurisdiction would the Commission then have over TAGS under sections 3 and 7 of the NGA.

V. Factual Predicates

A. The Gas Conditioning Plant

In its petition, Yukon Pacific states that:

> The proposed TAGS Project does not currently include development of a natural gas conditioning facility on the North Slope. Responsibility for construction and operation of gas conditioning facilities, if necessary, will be the subject of future negotiations between Yukon Pacific and North Slope gas producers. 16/

15/ As discussed below, we will also address the independent but related issue of the scope of Executive Order No. 10485, as amended.

16/ Petition at 3.

Alaskan Northwest points out that the President's Waiver of Law, supra, designated the Alaska Gas Conditioning Facility (AGCF) as part of the ANGTS, to be included in any final certificate issued by the Commission for the Alaskan segment of the ANGTS. Thereafter, the Commission issued an order amending Alaskan Northwest's conditional certificate so as to include the AGCF in it. 17/ No final certificate has been issued, and the AGCF has not been constructed.

In its Answer, Alaskan Northwest quotes from, analyzes, and discusses at length the application, as amended, that Yukon Pacific filed with the U.S. Department of the Interior's Bureau of Land Management for a federal right-of-way permit to cross federal lands in Alaska. Alaskan Northwest concludes that a gas conditioning plant will be needed in order to chill the gas (for transmission through an underground TAGS pipeline traversing permafrost areas of Alaska), to compress the gas to a high pressure, and to remove impurities and carbon dioxide. Alaskan Northwest next concludes that Yukon Pacific intends to use Alaskan Northwest's own AGCF for this purpose. Finally, Alaskan Northwest contends that Yukon Pacific and TAGS might become subject to NGA section 7 jurisdiction if Yukon Pacific becomes a joint owner of the AGCF or if Yukon Pacific's gas is commingled in the AGCF with Alaskan Northwest's gas. 18/

The Commission will not address this particular question in a hypothetical and speculative fact context. There is nothing in Yukon Pacific's petition per se to indicate that Yukon Pacific intends to either use or partially purchase Alaskan Northwest's conditionally certificated AGCF. We will proceed on the factual predicate that if a conditioning plant is needed at the North Slope for conditioning gas for TAGS, it will be a conditioning plant that is owned and operated by someone other than Alaskan Northwest, and that such plant will not be owned and operated pursuant to a section 7 certificate as part of the Alaskan segment of the ANGTS.

Our discussion of section 7 jurisdiction below is predicated, in part, on this factual assumption. If Yukon Pacific subsequently

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17/ Alaskan Northwest Natural Gas Transportation Co., 18 FERC ¶ 61,002 (1982).

18/ Alaskan Northwest's Answer at 14, 19-22, and 32-34; see also Foothills' Answer at 13, and 22-23.

decides to utilize Alaskan Northwest's conditionally certificated AGCF, the matter of section 7 jurisdiction would have to be reexamined in the context of those facts.

B. Potential Changes in TAGS' Configuration

Alaskan Northwest and Foothills trace the development of the TAGS project, presenting evidence that at earlier stages of this development the TAGS sponsors seriously considered various other proposals. One possibility considered was a pipeline in which the upper segment, from Prudhoe Bay to Fairbanks, would be 48 inches in diameter while the lower section, from Fairbanks to tidewater, would be 36 inches in diameter. The upper segment would then be usable as the first leg of the ANGTS. 19/ Another possibility that the sponsors may have considered would involve delivering some or all of the gas to LNG terminals on the west coast of the lower-48 states. Citing the absence of contracts for the sale of the gas to specific buyers in Asia, Alaskan Northwest and Foothills suggest that Yukon Pacific might revert to one or the other, or similar, modifications of its project as it develops in the future. 20/

Again, we will not speculate as to how Yukon Pacific may or may not revise its plans in the future. Our discussion of section 7 jurisdiction below is predicated on the facts stated in Yukon Pacific's application - a pipeline of constant, 36 inch diameter that runs from the North Slope to tidewater, entirely within the State of Alaska, unconnected to any other pipeline, not usable as part of the ANGTS, and with all of the gas transported for export across the Pacific to foreign countries with-

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19/ See, e.g., the letter from Mr. Walter J. Hickel, Yukon Pacific Corporation, to former Chairman Raymond J. O'Connor of the Commission, December 8, 1983, at p. 3. The authorized diameter of the Alaskan segment of the ANGTS is 48 inches. Alaskan Northwest Natural Gas Transportation Company, Order Approving Alaskan Segment Design Specifications and Initial System Capacity, 8 FERC ¶ 61,129 (1979); Order Denying Petitions to Vacate Order on Alaskan Segment Design Specifications and Initial System Capacity, 9 FERC ¶ 61,046 (1979).

20/ See Alaskan Northwest's Answer at 15-19; Foothills' Answer at 21-22, and 24.

out entering any other state of the U.S. If in the course of developing its project Yukon Pacific departs from these facts, the Commission will reexamine the matter to determine whether and how such changes affect the Commission's jurisdiction over TAGS.

C. The Source of TAGS' Gas

As discussed above this order makes no attempt to determine the legal status of the natural gas on the North Slope. Such determinations have an obvious bearing on what gas, if any, is available for export, which in turn could have a fundamental impact on the feasibility of the project. The discussion of jurisdiction below is predicated on the factual assumption that whatever gas TAGS transports would be gas determined by the appropriate federal authorities to be legally eligible for export via TAGS. In other words, if Yukon Pacific obtains all of the requisite federal approval to export gas produced on the North Slope of Alaska, what jurisdiction would the Commission then have under sections 3 and 7 of the Natural Gas Act over a TAGS pipeline that is configured pursuant to the factual predicates discussed above? That is the question we now address.

VI. Section 7 of the Natural Gas Act

Based on all of the factual predicates discussed above, the Commission would not have jurisdiction under section 7 of the Natural Gas Act.

Section 7 confers jurisdiction over the transportation, and the sale for resale, of natural gas in interstate commerce, and the construction and operation of facilities for that purpose. Section 7 refers to transportation and sales "subject to the jurisdiction of the Commission." Section 1(b) defines that jurisdiction in terms of transportation and sales "in interstate commerce." Section 2(7) defines "interstate commerce" as

> commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

The courts have consistently construed these provisions to mean that the sale or transportation of natural gas between one state and a foreign country does not constitute "interstate commerce" within the meaning of the NGA. Border Pipeline Co. v. F.P.C., 171 F.2d 149 (D.C. Cir. 1948); Distrigas Corp. v. F.P.C., 495 F.2d 1057, 1065 (D.C. Cir. 1974), cert. denied, 419 U.S. 834 (1974).

The facts upon which this declaratory order is predicated are that TAGS will begin and end in one state -- Alaska -- and never leave that state during the course of its journey from Prudhoe Bay to Valdez, and that the gas will then cross the Pacific to its market. On these facts, the transportation and sale of the gas clearly does not occur in interstate commerce within the meaning of the NGA. Accordingly, the construction and operation of TAGS does not facilitate transportation or sales in interstate commerce. Therefore, such construction and operation falls beyond the ambit of section 7 of the NGA. We stress, again, that this conclusion is premised on all of the factual predicates discussed above, including the facts regarding the conditioning plant, the configuration of the pipeline, and the sources of the gas.

VII. Section 3 of the Natural Gas Act

Section 3 of the Natural Gas Act requires prior authorization before exporting natural gas from the U.S. In 1977, the Department of Energy Organization Act transferred this function to the Secretary of Energy. 21/ In a series of delegation orders, the Secretary has delegated and assigned that function to the Administrator of ERA and to the Commission. Under the most recent, and presently applicable, delegation orders, the Administrator of the ERA has jurisiction to approve all aspects of the export except those aspects that involve the siting, construction and operation of new pipeline facilities. These new facilities aspects are delegated and assigned to the Commission.

Pursuant to Department of Energy Delegation Order No. 0104-111, effective February 23, 1984, 22/ the Secretary of Energy delegated to the Administrator of the Department's Economic Regulatory Administration the authority under section 3 of the NGA "to regulate . . . exports of natural gas." In paragraph (a) of Delegation Order No. 0204-112, issued on the same date, 23/ the Secretary delegated to the Federal Energy Regulatory Commission the authority to approve or disapprove "the place of . . . exit for exports" of natural gas whenever the export involves "the construction of new domestic facilities" (although reserving in the first instance the authority of the Administrator to disapprove

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21/ See sections 301(b), 402(a) and 402(f) of the Department of Energy Organization Act, 42 U.S.C. § 7151(b), § 7172(a) and § 7172(f).

22/ 49 Fed. Reg. 6684.

23/ Id.

any such place of export). The delegation orders also reserve to the Commission the authority to approve or disapprove "the construction and operation of particular facilities" necessary to implement the export, to the extent that such construction and operation falls within the jurisdictional ambit of the Natural Gas Act.

In light of this allocation of authority in the Secretary's delegation orders, the Commission clearly has jurisdiction under section 3 of the NGA to approve or disapprove (to the extent not previously disapproved by the Administrator) the place of export of the natural gas transported by TAGS. Such jurisdiction is independent of any additional jurisdiction the Commission may have (discussed below) to approve or disapprove the siting, construction and operation of new gas pipeline facilities necessary to implement the export.

In order to be able to export the gas, Yukon Pacific must first construct a large diameter pipeline that will traverse approximately 800 miles of territory, much of it wilderness in nature, with a gas liquefaction plant at its tidewater terminus. The construction of an 800 mile pipeline through wilderness areas, and the construction of a liquefaction plant, constitutes a major action significantly affecting the quality of the human environment. The National Environmental Policy Act of 1969 (NEPA) requires that an environmental impact statement (EIS) be prepared, and the Department of the Interior, in fact, is currently preparing an EIS for the project. The approval of a place at which the gas is authorized to be exported is clearly a federal action. Thus, in exercising its own statutory responsibilities under section 3 of the NGA, the Commission will also need to comply with NEPA, with access to an appropriate EIS. The Commission will consider the environmental ramifications of its decision in light of the analysis in the EIS before approving the place of export of the North Slope gas to be transported by TAGS.

We turn now to the matter of the siting, construction and operation of facilities. In Distrigas Corp. v. F.P.C., supra, 495 F.2d at 1064, the court held that "[u]nder Section 3, the Commission's authority over imports of natural gas is at once plenary and elastic," and that to prevent gaps in jurisdiction the Commission has the discretion under section 3 "to impose on imports of natural gas the equivalent of Section 7 certification requirements." Prior to the issuance of the present delegation orders, the Administrator of the ERA had occasion to exercise this function with respect to a gasification plant on the coast of California to be used in the importation of natural gas from

Indonesia for consumption entirely in California. 24/ Subsequent to the issuance of delegation orders transferring this function to the Commission, 25/ the Commission itself has had occasion to exercise jurisdiction -- under section 3 of the NGA by analogy to section 7, but not pursuant to section 7 -- over the continued operation of facilities used to import, reexport, and reimport gas from Canada that travels from Canada to Minnesota, back into Canada, and then back into Minnesota for consumption entirely within Canada and Minnesota. 26/ The Commission has also exercised that section 3 authority to approve the construction and operation of a very short pipeline under the Rio Grande to export gas from Texas to a town in Mexico. 27/

24/ Pac Indonesia LNG Company and Western LNG Terminal Associates, 1 ERA ¶ 70,101 (1979) at 70,511.

25/ The present delegation orders provide that authority as follows. Paragraph (d) of DOE Delegation Order No. 0204-111, the delegation to the Administrator of ERA, specifically excludes from ERA's jurisdiction "authority to approve the construction and operation of particular facilities . . . ." Inasmuch as the order itself delegates solely "authority under Section 3 of the NGA . . . ." it is clear that the exclusion in paragraph (d) encompasses section 3 authority to regulate the operation of facilities. Paragraph (a) of DOE Delegation Order No. 0204-112, the delegation to the Commission, contains the mirror image. It delegates to the Commission "the authority to perform the following functions with respect to the imports and exports of natural gas: (a) Approval or disapproval of the construction and operation of particular facilities." Inasmuch as paragraph (b) delegates to the Commission "[a]ll functions under Sections 4, 5 and 7 of the NGA," it is clear that paragraph (a) is intended to encompass authority to approve or disapprove the operation of particular facilities under section 3 of the Act; otherwise, paragraph (a) would serve no useful purpose and would be totally redundant to paragraph (b).

26/ Inter-City Minnesota Pipelines Ltd., 29 FERC ¶ 61,150 (1984). In that case, which involved facilities to import gas, with rate impacts on U.S. ratepayers, the Commission acted to close a regulatory gap.

27/ Valero Transmission Co. and Valero Industrial Gas Co., 27 FERC ¶ 61,151 (1984) and 30 FERC ¶ 61,035 (1985).

On the facts before us today, the Commission declines to exercise any discretionary authority it may have under section 3 of the NGA to regulate the siting, construction and operation of the TAGS pipeline. In the instance of an export of gas, unlike an import, there are no economic consequences to U.S. ratepayers. The cost of the project, and the risks inherent in it, will be borne (in whatever fashion) by the project sponsors, its lenders and investors, and its foreign purchasers of the gas. Thus, with respect to economic issues, there is no regulatory gap.

With respect to physical impacts, as noted above the decision to approve or disapprove the place of export will require access to an EIS. The EIS process will afford the Commission ample opportunity to consider the environmental and safety aspects of the pipeline and its liquefaction plant. If necessary, appropriate conditions could be attached to the authorization of the place of export to satisfy any concerns we may perceive with respect to safety and the environment. Accordingly, based on the factual predicates set forth above, at this time we see no need to assert discretionary jurisdiction under section 3 beyond the jurisdiction we already have under section 3 to approve or disapprove the place of export. We stress, however, that this determination is subject to reconsideration in the event of any changes in the facts upon which it is premised.

VIII. Executive Order No. 10485

Executive Order No. 10485, as amended 28/ and as delegated to the Commission by the Secretary of Energy, provides for the approval by the Commission of the construction and operation of gas pipeline facilities at the border of the U.S. and another country. In doing so, the Commission must first obtain the views of the Secretaries of State and Defense. The Federal Power Commission, pursuant to an opinion rendered by the Office of the Legal Counsel of the Department of Justice, determined that Executive Order No. 10485 does not apply to gas facilities on the border of the U.S. and international waters. Phillips Petroleum Company and Marathon Oil Company, 37 F.P.C. 777 (1967). Inasmuch as the TAGS project does not involve the construction or operation of any gas pipeline facilities at the border of the U.S. and another country, but only involves the construction of facilities at tidewater, Executive Order No. 10485 is clearly inapplicable.

28/ Exec. Order No. 10485, 18 Fed. Reg. 5397 (1953), as amended by Exec. Order No. 12038, 43 Fed. Reg. 4957 (1978).

This should end the discussion. In its petition, however, Yukon Pacific confuses Executive Order No. 10485 with section 3 of the NGA, contending that section 3 is "conditioned" by the executive order. The matter is further confused by Yukon Pacific's assertion that the Secretary of Energy's delegation of authority to approve the place of export of the gas was pursuant to section 7 of the executive order and not pursuant to section 3, that the executive order does not contain authority "to approve or disapprove the construction, operation siting and place of exit for exports of natural gas," and therefore that the Secretary's delegation and assignment of this authority in DOE Delegation Order No. 0204-112 "is merely an ultra vires act of the Secretary of Energy and is without force of law." 29/

We will dispel the confusion. Section 3 and Executive Order No. 10485 are totally independent sources of legal authority. They do not (indeed, can not) "condition" or implement each other. Section 3 of the NGA is a grant of authority from the Congress to the Federal Power Commission, subsequently transferred to the Secretary of Energy and, in turn, partially delegated by the Secretary to the Federal Energy Regulatory Commission. The Commission's authority, delegated to it by the Secretary, to regulate the place of export of the gas (and, in the Distrigas situation, to regulate the siting, construction and operation of facilities) derives from section 3 of the NGA, not from Executive Order No. 10485. Nothing in Executive Order No. 10485, as amended, purports to modify or restrict in any way the Secretary's or the Commission's authority under section 3 of the NGA.

Executive Order No. 10485 is a legal provision wholly independent from the NGA that imposes additional distinct requirements. When gas pipeline facilities are to be constructed at the border of the U.S. and a foreign country, considerations of foreign policy and national security are involved. Accordingly, the executive order requires that the Secretaries of State and Defense address these considerations. These requirements are in addition to the public interest requirements set forth in section 3 of the NGA with respect to the import and export per se. The President's authority to issue Executive Order No. 10485 does not derive from the NGA; on the contrary, it is an independent exercise of the President's executive powers under Article II of the Constitution to conduct foreign relations, and as Commander-in-Chief of the armed forces of the U.S. 30/

29/ Petition at 5-16; emphasis is in the petition.

30/ U.S. Const. Art. II, § 2, cl. 1 and cl. 2.

The separate and distinct character of section 3 of the NGA vis-a-vis Executive Order No. 10485 is illustrated by the Phillips Petroleum and Marathon Oil order, supra, relied upon by Yukon Pacific in its petition. The sponsors of that project filed separate applications, in separate dockets, for (1) authority under section 3 of the NGA to export specified volumes of natural gas from facilities in the Cook Inlet Basin area of Alaska, and (2) authority under Executive Order No. 10485 to construct and operate such facilities at the U.S. border. The Federal Power Commission's order granted the authority under section 3 to export the gas from and to the places described in that application, while dismissing the application for a border facilities permit. In the same manner, in the case at bar the Commission has jurisdiction under section 3 of the Natural Gas Act, as delegated by the Secretary of Energy, to approve the place of export of the gas to be exported.

The Commission orders:

(A) The motions to intervene filed by Alaskan Northwest, Foothills, PGT and PG&E, Northern Border, PIT, SoCal, Tennessee, and the California PUC are granted.

(B) The Commission's determination of its jurisdiction, and the factual predicates upon which it is based, are set forth above in the text of this order.

By the Commission.

(S E A L)

Kenneth F. Plumb

Kenneth F. Plumb,
Secretary.

Senator MURKOWSKI. I'm wondering how you maintain your very pleasant attitude and point of view when oftentimes you get decisions that are very difficult to interpret. Do you have a particular process, or do you line your counsels up against the wall and say, shape up or ship out?

Ms. HESSE. I think I would say I use whatever method the situation calls for.

Senator MURKOWSKI. Whatever method works, I urge you to continue it. Thank you very much, Mr. Chairman.

Ms. HESSE. Thank you, Senator.

Senator MURKOWSKI. Thank you, Ms. Hesse.

The CHAIRMAN. Thank you, Senator Murkowski.

Senator Melcher.

Senator MELCHER. Mr. Chairman, bear with me if you will because I'll be asking about matters that you fully understand and I only partially understand.

In the gas field in northern Montana, all or at least a part of it is called the Tiger Ridge Field. The private owners of gas are not getting it moved, its contractors are not getting it moved by the pipeline. The pipeline swings up into Canada and then swings down with connections and gets into Minnesota. Buyers of the gas, I am told by the pipeline, are not taking all that they should.

Now, what can you do about it?

Ms. HESSE. If the producer has a contract with the pipeline and that contract is being abrogated or its provisions are not being met, one of the things that the producer can do is to call the enforcement task force at the Commission. We will try to help in an informal way to resolve the dispute.

Senator MELCHER. What about the royalty owners?

Ms. HESSE. I think that I would suggest the same answer that I did before.

Senator MELCHER. When the owner of the gas is also the owner of the pipeline and the gas isn't moved, therefore no significant royalty payment, then the royalty owners and in this case the counties are severely damaged. Is it within your authority at FERC? Does it apply to relieving them, to helping them?

Ms. HESSE. Senator, I am told that the matter to which you refer is a specific case, that it's a pending matter before the Commission. I am probably not at liberty to discuss it, other than to express my concern and commitment to enforcing the rules and regulations of the Commission.

If we find that there is a problem, that something is wrong, we will insist that corrective action is taken.

Senator MELCHER. I am told that in the circuit court here, in the opinion on Order No. 436 the court seemed to be saying that the Commission has the authority to mandate contract carriage, maybe even common carriage, if it is necessary to prevent pipelines from exercising undue discrimination.

I think most people were a little bit surprised at the breadth of that decision. It seems to say that the court is saying that the Commission has a lot of authority on this point. What are you going to do with Order No. 436? Is it going to be a voluntary program, or do you think now that the Commission can now just order carriage?

Ms. HESSE. I think that at the moment our intention would be to promulgate a rule which would continue 436 as a voluntary program.

Senator MELCHER. It would continue as a voluntary program?

Ms. HESSE. Yes.

Senator MELCHER. For how long?

Ms. HESSE. I think that we believe that the gas industry is undergoing a transition to a more competitive environment, and that for the first time last year the pipelines transported more gas than they sold. But this is a trend, and it will continue.

The majority of the pipelines will in fact become 436 carriers.

Senator MELCHER. Will become what?

Ms. HESSE. 436 carriers. That they will become open access, nondiscriminatory transporters. That they will be indifferent between their merchant and transporter functions.

Senator MELCHER. What if they don't?

Ms. HESSE. I think that it's our belief that in the competitive world that we live in, that if most of the pipelines become 436 pipelines, and we believe that they will, the competitive pressures will be so great on the other pipelines that they in turn will become open access transporters. That is our current game plan.

Senator MELCHER. I said, what if they don't?

Ms. HESSE. Well, I think that we have not discussed that what if. I think that if in fact we find that our game plan, our strategy is not working, that pipelines are not becoming open access transporters, that we will go back and look at the statutory authority that the court says that we have, and look at it more in terms of being a mandatory program.

But I think that we're not in a position yet that we want to make it mandatory.

Senator MELCHER. What you've just said, if I can paraphrase—and correct me if I'm wrong—is that this is a pretty big club, and if they don't come around you're going to look at it. Is that fair?

Ms. HESSE. That it's a pretty big club and if they don't come around I'm going to look at it?

Senator MELCHER. Yes.

Ms. HESSE. Well, I think that I would exchange "look at" for "use".

Senator MELCHER. For what?

Ms. HESSE. For use. It's a pretty big club and if they don't come around——

Senator MELCHER. You would use the club.

Ms. HESSE. Yes.

Senator MELCHER. You agree that it's a pretty big club?

Ms. HESSE. I do.

Senator MELCHER. And that if they don't come around, then you're telling me you're going to use it.

Ms. HESSE. I would certainly recommend that to my colleagues.

Senator MELCHER. I guess the only other question on that particular point then is, what is the timeframe?

Ms. HESSE. Although I have not, of course, thought about a specific timeframe, my first thought is that if we find that I would say by next spring that we have not been able to move this industry to more open access transportation modes, that I would then suggest

to my colleagues that we look at making the provisions of 436 mandatory.

Senator MELCHER. Can you tell me how this would work if the pipeline had on-going service obligations for the Natural Gas Act?

Ms. HESSE. I'll have to supply that for the record. That's a legal question, and I'll have to supply that analysis for the record.

Senator MELCHER. I don't know what the suspension of the—let me rephrase that.

It's my understanding that this month, a few days ago, last week, that the Commission suspended contract demand reduction portion of Order No. 436 in response to the court decision.

Were there contract demand reductions which were allowed before the court decision?

Ms. HESSE. Yes.

Senator MELCHER. Will they be left in effect?

Ms. HESSE. It is our belief that most of the contracts that contained contract demand reduction provisions probably also have provisions for the situation that we've just encountered, i.e. the court remanded and vacated 436. There are contractual provisions to take care of the situation that we've just gone through.

If there are not contract provisions, we would wait and have those companies petition the Commission on a case by case basis.

Senator MELCHER. Petition for what, rescinding or what?

Ms. HESSE. Yes.

Senator MELCHER. Or petition for rescinding? Would that be a lengthy procedure?

Ms. HESSE. No. We would make certain that it is not because it's so important to the industry.

Senator MELCHER. Returning to Hill and Blane County in northern Montana, where the royalty owners and the school districts and the counties are suffering. What should be my position in not interfering with whatever you're doing but making sure that we correct the problem?

Ms. HESSE. Senator, as I mentioned before, this is a pending matter before the Commission. I am not familiar with the case. I cannot give you a status of the case at this moment. But I can assure you that I will submit it for the record and that I will make certain that we process this case as quickly as we can.

Senator MELCHER. I have a special interest in it, as you can guess.

Ms. HESSE. I understand.

[The information follows:]

(Request for status report with respect to FERC regulatory activity associated with natural gas production in northern Montana)

On July 9, 1986, Northern Natural Gas Company (Northern) requested authority in Docket No. CP86-607-000 to abandon its Montana natural gas facilities by sale to Tricentrol Holdings Inc. (THI). Companion filings were made on July 14, 1986, by a wholly owned affiliate of THI, Tricentrol Interstate Pipeline Inc. (Tricentrol), in Docket Nos. CP86-616-000 and CP86-617-000. If approved, the transfer of Northern's Montana facilities (valued at approximately $18.7 million on December 31, 1985) to THI would involve, among other things, the release of an estimated 20.2 Bcf of deregulated natural gas reserves which Northern would otherwise be obligated to purchase from THI. Additionally, Northern states that it has negotiated additional releases with other producers which could result in the release of additional reserves of natural gas deregulated under section 121 of the Natural Gas Policy Act (NGPA). The terms of the release agreements, which include cash payments, were not disclosed in the applications filed with the Commission. Northern would continue to purchase jurisdictional natural gas from the independent producers with which it currently has contracts.

In Docket No. CP70-69-001, Northern also sought amended Presidential Permit authority (needed to export natural gas to Canada through Northern's border facilities) to allow it to provide interim transportation for others on its Montana system. This authority was granted in an order issued November 10, 1986, as corrected on December 1, 1986. Coupled with Northern's limited term abandonment authority, blanket off-system sales authority, and open access transportation, this could could result in the delivery of significant volumes of Montana gas to the spot market. Complimentary Canadian authority may be necessary to provide downstream transportation.

Tricentrol, in addition to acquiring Northern's facilities, proposes to become a non-discriminatory transporter under the Commission's open access transportation program. Once blanket certificate approval is issued and accepted, Tricentrol would provide transportation services for any party, including Montana producers, to the extent capacity is available. This could facilitate the movement of additional volumes of Montana gas to the spot market in the future.

The Secretary of the Commission issued public notices of these applications on July 22, 1986,, and July 24, 1986, requiring comments, protests, and interventions to be filed on or before August 8, 1986. At the request of Senator Melcher, and others, the Secretary of the Commission extended the period for public comment to September 8, 1986.

Several parties filed interventions requesting a full formal hearing to examine the impact on producers and royalty holders in Montana.

Subsequently, Commission staff was approached by the principle parties in this case, Northern, Tricentrol, and an attorney representing the independent producers, requesting that staff delay its investigation and allow the parties to attempt to work out a settlement agreement satisfying the concerns raised by the interveners. As of July 15, 1987, the Commission staff understands that the parties are still negotiating a mutually agreeable settlement.

Senator MELCHER. I'll look forward to a status report and some indication of what might be proper for me to do in this matter.

Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Domenici.

Senator DOMENICI. Thank you very much, Mr. Chairman.

Let me first welcome you here again and indicate to you my appreciation and compliments with reference to your tackling the problem of take or pay. Obviously it is an enormously difficult issue. As I understand it, the court order in decision 436 said that FERC should have, and apparently it is fair to say that you have a head start on that issue, having started some take or pay deliberations prior to that time.

Ms. HESSE. I think that's fair.

Senator DOMENICI. Also, I want to just compliment you on the Canadian situation on the as billed decision that has been made.

Let me ask you about that decision and sending back your order for further deliberations and considerations. You're going to have to rework that order. Will that order, as you see it, disrupt the already chaotic natural gas transportation situation?

That is, you know natural gas producers in New Mexico and elsewhere are already having a very difficult time. Will there be more disruptions in the marketplace, or will there be some calming of that situation? Will it get better or worse, as you see it?

Ms. HESSE. In terms of imported versus domestic gas, I think the situation should be much calmer. We have issued a final decision that says that U.S. pipelines will not bill U.S. customers any differently based on whether it is domestic or imported gas.

That situation I think should stabilize.

Senator DOMENICI. But will the court decision further disrupt the already chaotic natural gas transportation situation?

Ms. HESSE. I think not. I think that we will be prepared by the end of this month to issue an interim rule which will take effect immediately, although it will be subject to comment before a final rule is issued. By quick action we should be able to calm the industry and they will know that in fact we continue to be committed to open access transportation. They will know that the rules of the game will continue, what they are and that they will continue.

Senator DOMENICI. I wasn't here for all of the questions, and consequently didn't hear all of your answers. But did I understand correctly that in response to a question you indicated that you are considering tying take or pay relief to pipelines as a quid pro quo for obtaining access or transportation capability?

Ms. HESSE. Senator, that was a suggestion of the court. As such, we must consider it. I am not suggesting that as a Commission we have decided to do that.

I have some personal problems with that. I think that if we are going to condition access, that we would have to have so many conditions and rules and requirements that the final rule that would result might not be recognizable.

I think we have to be very careful that we do not approve the abuse of monopoly power by the pipelines. We are concerned about that.

Senator DOMENICI. So that you do not read the decision to say you must do that, but rather that that is one of the things that the decision suggests.

Ms. HESSE. That's my interpretation.

Senator DOMENICI. And you are aware that that kind of abrogation of contract, be it conditional to furnishing access or not, has been a matter of serious disagreement within the Congress. In fact, probably as much as anything else that caused the last natural gas deregulation bill to have serious problems up here. You're aware of that?

Ms. HESSE. Yes, Senator.

Senator DOMENICI. You add to that the fact that it may be very difficult to analyze and implement that kind of approach, if I read you right.

Ms. HESSE. That's correct. In addition to that, I do not favor abrogation of contracts, and I know that a number of my colleagues agree with me.

Senator DOMENICI. I again want to indicate to you that you and your colleagues have a most difficult job. It would be difficult if we weren't undergoing dramatic change—but we are—in the whole field of energy. That just makes your job more difficult.

I think you've done a good job, and I hope we will expeditiously recommend your confirmation to the Senate. Thank you for all your work.

Ms. HESSE. Thank you, Senator.

Senator DOMENICI. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Domenici. Are there further questions?

Members who wish to submit questions should do so by Monday, July 13 at the close of business.

Chairman Hesse, it has been a pleasure to have you here before the Committee. We don't always have so harmonious a hearing on nomination. I'm glad that in your case it was harmonious because I think you deserve it. I think you've done very well. Thank you very much.

Ms. HESSE. Thank you, Mr. Chairman.

The CHAIRMAN. The committee will adjourn.

[Whereupon, at 11:22 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Financial Statement of Martha O. Heese

UNITED STATES SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

Name: HESSE (LAST) MARTHA (FIRST) OSSIAN (OTHER)

Position to which nominated: Member of the Federal Energy Regulatory Commission

Date of nomination: 6/16/87

Date of birth: 14 (DAY) 08 (MONTH) 42 (YEAR)

Place of birth: Hattiesburg, Mississippi

Marital status: Single

Full name of spouse:

Name and ages of children: None

Education:

Institution	Dates attended	Degrees received	Dates of degrees
University of Iowa	1960-1964	NA	
Northwestern University	1976-1977	NA	
University of Chicago	1977-1979	MBA	1979

Employment record: List below all positions held since college, including the title and description of job, name of employer, location, and dates.

Research Analyst, National Blue Shield, Chicago, IL, 1964-1966

Research Associate, National Opinion Research Center, University of Chicago, Chicago, IL, 1966-1967

Director, Division of Data Management, American Hospital Association. Chicago, IL, 1967-1969

Consultant, Compucare, Inc., Chicago, IL, 1969-1970

Director, Information Services Center, American College of Hospital Administrators, Chicago, IL, 1971-1977

Employment record—Continued

Director and Chief Operating Officer, SEI Information Technology, Chicago, IL, 1969-1980

Associate Deputy Secretary, U.S. Department of Commerce, Washington, DC, 1981-1982

In May, 1982, I was detailed to the Office of Management and Budget as Executive Director, President's Task Force on Management Reform

Assistant Secretary, Management and Administration, Department of Energy, Washington, DC, 12/82-10/5/86

Chairman/Commissioner, Federal Energy Regulatory Commission, Washington, DC, 10/6/86-Present

Military service: Describe any military service not listed above, including dates, rank, and type of discharge.

None

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

None

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations.

Organization	Dates	Office held (if any)
Data Processing Management Association	1975-1977	None
Dean's Fund University of Chicago Graduate School of Business	1982-1984	Vice Chairman

Published writings:

List the titles, publishers and dates of any books, articles, or reports you have written.

None

Future employment relationships:

1. Will you sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate?

I am currently an employee of the Federal government

2. Do you have any plans after completing government service to resume employment, affiliation or practice with your current or any previous employer, business firm, association or organization?

I have no such plans.

3. Has a commitment for employment after you leave government been made to you by anyone? Have you made any such commitment?

No.

4. (a) If you have been appointed for a fixed term, do you expect to serve the full term?

Yes.

Future employment relationships—Continued

(b) If you have been appointed for an indefinite term, are there any known limitations on your willingness or ability to serve for the foreseeable future?

Does not apply.

Financial statement:

1. Attach a copy of your Executive Personnel Financial Disclosure Report (SF 278).

2. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services and firm memberships or from former employers, clients, and customers. Amounts should be indicated by the categories established for reporting income on Form SF 278, Schedule A.

None.

3. Are you currently a party to any legal action? If so, describe its nature and status.

No.

4. Have you ever declared bankruptcy? If so, describe the circumstances.

No.

5. Have you filed a Federal income tax return for each of the last 10 years? If not, please explain.

Yes.

6. Has the Internal Revenue Service ever audited your Federal tax return? If so, what resulted from the audit?

My personal tax return for 1978 was examined as part of a routine audit of a closely held corporation of which I was an officer and major stockholder. The return was found to be in order.

Potential conflicts of interest:

1. List any investments, obligations, liabilities, or other relationships which might involve potential conflicts of interest with the position to which you have been nominated.

There are none.

2. Describe any business relationship, dealing or financial transaction (other than taxpaying) that you have had during the last 10 years with the Federal Government, whether for yourself or relatives, on behalf of a client, or acting as an agent, which might in any way constitute or result in a possible conflict of interest with the position to which you have been nominated.

There are none.

3. Describe any lobbying activity which you have performed during the past 10 years with respect to legislative or administrative actions at the Federal, State or local level.

I have not engaged in any lobbying activities.

4. Have you been informed of the conflict of interest laws and regulations applicable to the position to which you have been nominated?

Yes.

Potential conflicts of interest—Continued

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to this form and the attachments thereto. Attach a statement of the appropriate agency ethics official explaining the applicable laws or regulations, any potential conflicts, and the action required to resolve such conflicts.

Does not apply.

6. Explain how you will resolve any potential conflicts of interest that may arise in the future if you are confirmed for the position for which you have been nominated.

I will comply with the Commission's regulations concerning conflicts of interest and will seek and abide by the advice of the Associate General Counsel Enforcement, General Law and Rulemaking.

Public disclosure: Do you have any objections to this form and the attachments thereto being made public?

No.

AFFIDAVIT

) ss

I, _____, being duly sworn, hereby state that I have read the foregoing Statement for Completion by Presidential Nominees, including all attachments thereto, and that the information provided therein is, to the best of my knowledge and belief, current, accurate, and complete.

_____
(Signature of Nominee)

Subscribed and sworn to before me this 17th day of June, 1987

_____
Notary Public

My Commission Expires March 31, 1990

Form approved by the Committee February 5, 1985.

U.S. GOVERNMENT PRINTING OFFICE : 1985—43-098

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

JUN 26 1987

Honorable J. Bennett Johnston
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Martha O. Hesse, who has been nominated by President Reagan for the position of Chairman, Federal Energy Regulatory Commission.

We have reviewed the report and have also obtained advice from the Federal Energy Regulatory Commission concerning any possible conflict in light of the Commission's functions and the nominee's proposed duties. Based thereon, we believe that Ms. Hesse is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

David H. Martin
Director

Enclosure

CON 132-64
March 1986

Financial Disclosure Report

Reporting Status (Check Appropriate Box)		Agency Use Only	OGE Use Only	Date of Appointment, Candidacy, Election or Nomination (Mo., Day, Yr.)	Termination Date (If Applicable) (Month, Day, Year)
☐ Incumbent	☒ New Entrant, Nominee, or Candidate ☐ Termination Filer				
Reporting Individual's Name	Last Name: HESSE	First Name and Middle Initial: MARTHA O.			
Position for Which Filing	Title of Position: Chairman/Commissioner	Department or Agency (If Applicable): Federal Energy Regulatory Commission			
Location of Present Office	Address (Number, Street, City, State and ZIP Code): 825 North Capitol Street, N.E., Room 9000 Washington, DC 20426		Telephone No. (Include Area Code): (202) 357-8200		
Position(s) Held With the Federal Government During the Preceding 12 Months (If Not Same as Above)	Title of Position(s) and Date(s) Held: Assistant Secretary (Management and Administration) Department of Energy December 1982 - October 1986				
Presidential Nominees Subject to Senate Confirmation	Name of Congressional Committee Considering Nomination: Energy and Natural Resources	Do You Intend to Create a Qualified Diversified Trust? ☐ Yes ☒ No			

Certification	Signature of Reporting Individual	Date (Month, Day, Year)
I CERTIFY that the statements I have made on this form and all attached schedules are true, complete and correct to the best of my knowledge and belief.	Martha Hesse	June 19, 1987
Other Review (If desired by agency)	Signature of Other Reviewer	Date (Month, Day, Year)
Agency Ethics Official's Opinion	Signature of Designated Agency Ethics Official/Reviewing Official	Date (Month, Day, Year)
The information contained in this report discloses no conflict of interest under applicable laws and regulations.	Michael Schott	6/23/87
Office of Government Ethics Use Only	Signature	Date (Month, Day, Year)
	David H. Martin	6-26-87

Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)

(Check box if comments are continued on the reverse side) ☐

Reporting Periods

Incumbents: Complete Schedules A, B, C, and Part I of D. The reporting period is the preceding calendar year except for Part II of Schedule C and Part I of Schedule D where you must also include any positions held or agreements or arrangements made from the beginning of the filing year until the date you file.

Termination Filers: Complete Schedules A, B, C, and Part I of D. The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination.

Nominees, New Entrants and Candidates for President and Vice President: Complete Schedules A, C, and D. (Candidates do not file Part II of Schedule D.)

- **Schedule A**—The reporting period for income (BLOCK C) and Transactions Test (BLOCK D) is the preceding calendar year and the current calendar year up to the date of filing. Value assets in BLOCK B as of any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part I** (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to any date you choose that is within 31 days of the date of filing.
- **Schedule C, Part II** (Agreements and Arrangements)—Show any agreements or arrangements as of the date of filing.
- **Schedule D**—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.

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278-109

NSN 7540-01-070-8444

Reporting Individual's Name	Assets and Income	Page Number	Schedule A
Martha Ovcion Hrase		2	

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income; only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Sources	BLOCK B Valuation of Assets	BLOCK C Income	BLOCK D Transactions Test
Identify each asset and income source of short, your spouse(s) and your dependent child (DC) NONE ☐	Category of value (A)	Type of income (B)	Category of Amount of Income (A)
	None (or less than $1,001) · $1,001 - $15,000 · $15,001 - $50,000 · $50,001 - $100,000 · $100,001 - $250,000 · Over $250,000	Dividends · Rent · Interest · Capital Gains · Exempt from Trust · Qualified Trust · Other (Specify Type)	None (or less than $201) · $201 - $1,000 · $1,001 - $2,500 · $2,501 - $5,000 · $5,001 - $15,000 · $15,001 - $50,000 · $50,001 - $100,000 · $100,001 - $1,000,000 · Over $1,000,000 · Actual Amount Only if "Other" Specified · Date (Mo., Day, Yr.) Only if Noncash	YES · NO
Rigan National Bank			$50,000	
Art and Antiques				
Jewelry (Precious Stones)				
Trouble Will (Pawn Brokers Investment, Ltd Hyde, San Antonio, Tx (mortgage loaning)				
Equifund L.P.				
Delaware Cash Reserves				
Merrill Lynch Ready Assets				
2700 Virginia Ave., N.W. Washington, DC				
Stanley Plaza, LLC (Bolton) New York, New York				
Gerald McHugh (Purchase of his C.D. 5/2)		Yield Rollover	$20,000	

Reporting Individual's Name: Martha Ossian Brano

Assets and Income

Page Number: 3

Schedule A

All Filers: In BLOCK A report (a) the identity of each asset held for the production of income at the close of the reporting period which had a fair market value exceeding $1000 and (b) any other asset or source of income which generated over $100 in income during the reporting period. This includes but is not limited to employers, stocks, bonds, tax shelters, bank accounts, real property, mutual funds, pensions, IRA assets, assets of certain trusts, commodities futures, personal businesses and partnership interests. Exclude your personal residence unless you rent it out. See instructions for rules on bank accounts and complex holdings.

All Filers: In BLOCK B report the value of each asset listed in BLOCK A which had a fair market value exceeding $1000 at the close of the reporting period.

All Filers: In BLOCK C report the type and amount of income exceeding $100 or more received from the assets and other sources of income listed in BLOCK A. You must report the **actual amount** of any income not of a type specifically noted below. You need not report the actual amount of your spouse's earned income, only the source in BLOCK A. You may not check "qualified trust" unless you have a blind trust which has been specifically approved by the Office of Government Ethics. If you, your spouse or dependent child are the beneficiary of a trust which no one of you created and has no knowledge of the assets, refer to the instructions to see if it qualifies as an "excepted trust." If "none" (or less than $101) is checked under Category of Amount of Income, no other entries need be made in BLOCK C for that item.

Incumbents and Termination Filers only: In BLOCK D, for any real property, stocks, bonds, commodities futures and other securities listed in BLOCK A, did you purchase, sell, or exchange the item during the reporting period for a value that exceeds $1000?

BLOCK A Assets & Income Source	BLOCK B Valuation of Assets									BLOCK C Income															BLOCK D Transactions Test	
Identify each asset and income source of yours, your spouse(S) and your dependent child (DC). NONE ☐	Category of Value (X)									Type of Income (X)							Category of Amount of Income (X)								Actual Amount Only if "Other" Specified	Date (Mo., Day, Yr.) Only if Honoraria	If yes, complete Schedule B Part I for these assets, including those sold for a loss	
	Asset (or less than $1001)	$1,001 $15,000	$15,001 $50,000	$50,001 $100,000	$100,001 $250,000	$250,001 $500,000	$500,001 $1,000,000	Over $1,000,000		Dividends	Rent	Interest	Capital Gains	Excepted Trust	Qualified Trust	Other (Specify Type)	Asset (or less than $101)	$101 $1,000	$1,001 $2,500	$2,501 $5,000	$5,001 $15,000	$15,001 $50,000	$50,001 $100,000	Over $100,000			YES	NO
S DC — Eagle pen — S & Z Common				X						X									X								X	
Doe Jones & Smith, Homespun, USA				X												primary income									$50,000			
1 HPSC			X										X[1]					X[1]									T	A
2 AudIo Video Affiliatee, Inc.		X											X[1]				X[1]										D	P
3 Telecom Plus Int'l, Inc.			X										X[1]					X[1]									T	P
4 America West Airlines, Inc.			X														X											L
5 Seagate Technology			X										X[1]						X[1]									T
6 St. Joe Gold Corp.		X															X											C
7 Damon Biotech, Inc.	X																X											A
8 Preferred Health Care			X										X[1]					X[1]										R
9 Investors FNMA Mtg. Backed Securities (Sharwood Fund)				X						X											X							L
10																												F

PREVIOUS EDITION USABLE

Reporting Individual's Name

Martha Ossian Hesse

Page Number	Schedule
4	A

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC	Exam ple	Identification of Assets	Type of Transaction (X) Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X) $1,001 $15,000	$15,001 $50,000	$50,001 $100,000	$100,001 $250,000	Over $250,000
		X Y Z Common									
1		HPSC	X			2/1/83		X			
2		Seagate Technology, Inc.		X		1/31/86		X			
3		Audio Video Affiliates, Inc.		X		1/28/86		X			
4		Telecom Plus Int'l, Inc.	X	X		2/25/86 1/30/86	X				
5		American West Airlines, Inc.	X	X		2/28/86 1/31/86		X			
6		St. Joe Gold Corp.	X	X		2/28/86 2/6/86		X			
			X	X		2/23/86	X				

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. **Exclude** transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), **exclude** gifts from relatives and **exclude** gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☒

S	Source (Name and Address) Exam ples	Brief Description	Value
	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
	Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1			
2			
3			
4			
5			
6			

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SF 278 (Rev. 1/89)
FPM Chapter 734
U.S. Office of Personnel Management

Reporting Individual's Name
Martha Ossian Hesse

Page Number	5	Schedule B

Part I
Transactions

Incumbents and Termination Filers only: Report any purchase, sale or exchange by you, your spouse or dependent child during the reporting period of any real property, stocks, bonds, commodities futures, and other securities when the amount of the transaction exceeded $1,000. Include transactions that resulted in a loss. Do not report a transaction involving property used solely as your personal residence, or a transaction between you, your spouse or your dependent child.

NONE ☐

S or DC	Example	Identification of Assets	Type of Transaction (X) Purchase	Sale	Exchange	Date (Mo., Day, Yr.)	Amount of Transaction (X) $1,001 $15,000	$15,001 $50,000	$50,001 $100,000	$100,001 $250,000	Over $250,000
	Example	X Y Z Common	X			2/1/83		X			
1		Damon Biotech, Inc.	X	X		2/19/86 2/28/86	X				
2		Preferred Health Care		X		2/5/85 1/31/86		X			
3											
4											
5											
6											

Part II
Gifts, Reimbursements and Travel Expenses

Incumbents and Termination Filers only:
Report the source, a brief description and the value of: (1) in-kind gifts of transportation, lodging, food or entertainment received from one source totaling $250 or more unless received as personal hospitality at the donor's personal or family residence; (2) other gifts received from one source totaling $100 or more in value; and (3) cash reimbursements of $250 or more received from one source. Exclude gifts and reimbursements received by your spouse that were given totally independent of their relationship to you. **Exclude** transportation, lodging, food and reimbursements from the U.S. Government. For (1) and (2), **exclude** gifts from relatives and **exclude** gifts of $35 or less when aggregating them for the total from one source. See instructions for further exclusions.

NONE ☒

S		Source (Name and Address)	Brief Description	Value
	Example	Nat'l Assn. of Rock Collectors, NY, NY	Airline ticket, hotel room & meals incident to national conference 6/15/83	$500
	Example	Nat'l Assn. of Rock Collectors, NY, NY	Leather briefcase for retiring president	$125
1				
2				
3				
4				
5				
6				

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OF 278 (Rev. 1/83)
GPO 1983 0-381-154
U.S. Office of Personnel Management

Reporting Individual's Name

Martha Ossian Hesse

Page Number	5	Schedule C

Part I
Liabilities

All Filers: Report liabilities over $10,000 owed to any one creditor at any time during the reporting period by you, your spouse or dependent child. Check the highest amount owed during the reporting period. **Exclude** a mortgage on your personal residence unless it is rented out, loans secured by automobiles, household furniture or appliances, and liabilities owed to relatives. See instructions for revolving charge accounts.

NONE ☐

S or DC	Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term (if applicable)	Category of Amount or Value (X) $10,001 to $15,000	$15,001 to $50,000	$50,001 to $100,000	$100,001 to $250,000	Over $250,000
Examples	First District Bank, Washington, DC	Mortgage on rental property, Rehoboth Beach, Delaware	1981	13%	25 yrs			X		
Examples	John Jones, 123 J St., Washington, DC	Promissory note	1979	10%	on demand	X				
1	Miriam H. Smith Washington, DC	For 2700 Virginia Ave., N.W.	March 1982	12%	10 yrs.			X		
2										
3										
4										
5										
6										

Part II
Agreements Or Arrangements

All Filers: Report your agreements or arrangements for future employment, leaves of absence, continuation of payment by a former employer (including severance payments), or continuing participation in an employee benefit plan. See instructions regarding the reporting of negotiations for any of these arrangements or benefits.

NONE ☒

Status and Terms of any Agreement or Arrangement	Parties	Date (Mo., Yr.)
Example: Pursuant to partnership agreement, will receive capital account & partnership share calculated on service performed through 11/83	Doe Jones & Smith, Home town, USA	7/75 Partnership agmnt

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278-108

278 (Rev. 1-94)
OGE (5 CFR) 734
U.S. Office of Personnel Management

Reporting Individual's Name
Martha Osslan Hesse

Page Number	7	Schedule D

Part I
Positions Held Outside U.S. Government

All Filers: Report any positions held during the applicable reporting period. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities or those solely of an honorary nature.

NONE ☐

Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
Examples: Nat'l Assn. of Rock Collectors, NY, NY	Non profit education	President &	6/82	6/83
Doe Jones & Smith, Hometown, USA	Law firm	Partner	7/75	11/87
Stanley Plates, Ltd., New York, New York	Women's Fashion Couture House	Office/Director	3/86	5/86

Part II
Compensation In Excess Of $5000 Paid by One Source

Nominees and New Entrants only: Report sources of such compensation received by you or your business affiliation for services directly provided by you during the reporting period. This includes the names of clients and customers of any corporation, firm, partnership or other business enterprise, or any nonprofit organization, when you directly provided the services generating a fee or payment of more than $5,000. You need not report the U.S. Government as a source.

NONE ☒

Source (Name and Address)	Brief Description of Duties
Examples: Doe Jones & Smith, Hometown, USA	Legal services
Metro University (client of Doe Jones & Smith) Hometown, USA	Legal services in connection with university construction

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278 (09)

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

CHAIRMAN

June 17, 1987

The Honorable J. Bennett Johnston
Chairman
Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please be advised that pursuant to section 201(b) of the Ethics in Government Act of 1978, as amended, I have informed the appropriate ethics officials that the information required by section 202(a)(1)(A) with respect to income and honoraria is current as of June 17, 1987.

Sincerely,

Martha O. Hesse

Martha O. Hesse

_____ ss

Subscribed and sworn to before me this 17th day of June, 1987.

Karen M. Jacobs
Notary Public
My Commission Expires March 31, 1990

cc: The Honorable James A. McClure

OFFICIAL COMMITTEE FILE
PLEASE RETURN

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

CHAIRMAN

July 6, 1987

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
JUL 7 1987
WASHINGTON, D.C. 20510

The Honorable J. Bennett Johnston
Chairman
Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please be advised that pursuant to section 201(b) of the Ethics in Government Act of 1978, as amended, I have informed the appropriate ethics officials that the information required by section 202(a)(1)(A) with respect to income and honoraria is current as of July 4, 1987.

Sincerely,

Martha O. Hesse

DISTRICT of COLUMBIA ss

Subscribed and sworn to before me this 6TH day of July, 1987.

Notary Public
My Commission Expires 11/30/90

cc: The Honorable James A. McClure

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JUN 23 1987

Chairman Martha O. Hesse
Federal Energy Regulatory Commission
825 North Capitol Street, NE.
Washington, DC 20426

Dear Ms. Hesse:

This letter serves as the statement from the Designated Agency Ethics Counselor of this Commission required by question six (page five) of the Statement for Completion by Presidential Nominees that you are submitting to the United States Senate Committee on Energy and Natural Resources. I have reviewed your Standard Form 278 (Financial Disclosure Report), dated June 19, 1987, and have issued my opinion to David H. Martin, Director, Office of Government Ethics, that the Form discloses no conflicts of interest under the Department of Energy Organization Act (DOE Act), P.L. 95-91, the Commission's Standards of Conduct (18 C.F.R. §§ 3c.201-206) or the conflict of interest provisions generally applicable to Federal Government officials.

Section 602(a) of the DOE Act prohibits supervisory employees from knowingly receiving compensation from, holding any official relation with, or having any pecuniary interest in any energy concern. The term "energy concern" is defined in Section 601(b) of the DOE Act to include any entity "significantly engaged in the business" of energy development, extraction, production, refining, transportation, distribution or sale, or significantly engaged in conducting research and development related to these activities, or in research, development or demonstration under a DOE-funded program. The term also includes any entity holding an interest in property from which coal, natural gas, crude oil, nuclear material or a renewable resource is commercially produced or obtained.

Further, Section 208, Title 18, United States Code, and applicable Commission regulations, 18 C.F.R. § 3c.204(b)(3), prohibit a government official from participating personally and substantially in any particular matter in which she, her spouse, minor child, partner, or organization in which she is serving as officer, director, trustee, partner, or employee, has a financial interest, or in which a prospective employer has a financial interest. This provision has been interpreted to prohibit participation in any particular matter whose effect on the relevant financial interest would be direct and predictable.

If I may be of further assistance, please let me know.

Sincerely,

Michael Schopf
Associate General Counsel
for Enforcement, General
Law and Rulemaking

Enclosure

cc: Senate Committee on
Energy and Natural Resources

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JUN 23 1987

Chairman Martha O. Hesse
Federal Energy Regulatory Commission
825 North Capitol Street, NE.
Washington, DC 20426

Dear Ms. Hesse:

I have approved your financial disclosure report (Form 278), and enclose copies of my opinions determining that the report discloses no conflict of interest. The original of the letter addressed to you has already been delivered to the Senate Committee on Energy and Natural Resources.

Sincerely,

Michael Schopf
Associate General Counsel
for Enforcement, General
Law and Rulemaking

Enclosures

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JUN 23 1987

Mr. David H. Martin
Director
Office of Government Ethics
1717 H Street, NW.
Washington, DC 20415

Dear Mr. Martin:

This letter is to advise you that I have received and reviewed the Executive Personnel Financial Disclosure Report, Form 278, of Martha O. Hesse. Ms. Hesse's financial report discloses no assets or associations that could give rise to a confict of interest under the Department of Energy Organization Act, P.L. 95-91, the Commission's Standards of Conduct, or the conflict of interest provisions generally applicable to Federal Government officials.

I am enclosing Ms. Hesse's financial form, which I have signed, and her job description as required by the financial disclosure regulations of the Office of Government Ethics. I will be happy to provide any further assistance you may find helpful.

Sincerely,

Michael Schopf
Associate General Counsel
for Enforcement, General
Law and Rulemaking

Enclosures

Executive Level Position Statements

Position Title: Member, Federal Energy Regulatory Commission

Grade: EL-IV - Presidential Appointee - (PAS)

The incumbent serves as a member of the five-man Federal Energy Regulatory Commission and is responsible for meeting officially with the other members to decide issues concerned with:

- The issue and enforcement of licenses for hydro-electric power-projects
- The establishment and enforcement of rates and charges for the sale and transmission of electricity and for the non-emergency interconnection of facilities for the generation, transmission, and sale of electricity
- The establishment and enforcement of rates and charges for the transmission and sale of natural gas
- The issue and enforcement of certificates of public convenience and necessity for construction of facilities, abandonment of services or facilities, etc.
- The establishment and enforcement of curtailments of natural gas (other than establishment and review of curtailment priorities)
- The regulation of mergers and securities acquisition under the Natural Gas Act and Federal Power Act
- Other functions as may be assigned by the Secretary

The incumbent is appointed by the President but reports to the Chairman, FERC and is not subject to the supervision and direction of any other official of the Department, including the Secretary.

APPENDIX II

Responses to Additional Committee Questions

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

CHAIRMAN

July 20, 1987

Dear Mr. Chairman:

Enclosed are my responses to oral and written questions for the record of your committee's July 9 confirmation hearing to consider my nomination to serve a full term on the Federal Energy Regulatory Commission.

I very much appreciated the opportunity to appear before the Energy and Natural Resources Committee and am grateful for the warm support which you and other members of the committee so kindly offered.

If you have any further questions or need additional information, please do not hesitate to call me.

Sincerely,

Martha

Martha O. Hesse

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Questions For The Record From Senator Johnston

Question 1: In its June 23, 1987, decision on Order No. 436, the Court gave the Commission a clear blueprint of acceptable and necessary take-or-pay action, i.e., conditioned access and setting aside the take-or-pay clauses of jurisdictional contracts. The Court said the "FERC's seeming blindness to the possible impact of Order 436 on take-or-pay liability, and its tendency to elevate into affirmative benefits what are at best palliatives, seem impossible to square with the requirement of reasoned decisionmaking" (p. 85 of the Court's opinion). In his dissent, Judge Mikva warned against the Commission opting for inaction by employing different reasoning on take-or-pay.

(a) What affirmative steps will the Commission take to address take-or-pay costs, both past and future?

(b) Will the Commission take action at the wellhead to contain take-or-pay costs?

Answer 1: At present, I am unable to say what steps the Commission will take to address take-or-pay costs, both past and present, in response to the Court's decision. The Commission is examining numerous options, including those suggested by the Court with respect to action at the wellhead to contain these costs. These include conditioning producers' access to transportation on their granting pipelines take-or-pay relief and taking some action on jurisdictional contracts under section 5 of the Natural Gas Act.

The Commission is also considering options at the citygate, including addressing the Court's concerns about the contract adjustment provisions of Order No. 436, which the Court said aggravated the pipelines' jeopardy from take-or-pay liability. In this vein, on July 2, 1987, the Commission issued an order staying those provisions, subject to leave of Court. We concluded that a stay would maintain a status quo most consistent with the Court's decision that the CD adjustment provisions are, in their present form, flawed and that these provisions are interrelated with the take-or-pay problems of the pipelines. On July 17, 1987, the Court granted the Commission's request to stay the effectiveness of the CD adjustment provisions.

As you know, on March 5 the Commission issued a proposed take-or-pay policy statement. This statement primarily dealt with past take-or-pay costs by setting forth criteria for the recovery of such costs. Specifically, under the proposed policy, a pipeline would be allowed to recover through a demand charge the costs to buy out or buy down liability under existing contracts provided the pipeline was willing to absorb an equitable portion of those costs. This method of recovery contrasts with with existing policy of recovery through a commodity charge. The proposed policy statement also discussed dealing with future take-or-pay through the design of a charge which would collect future costs of reserving or contractually committing gas on current basis. In other words, the proposed policy statement contemplates dealing with future take-or-pay by discouraging the accumulation of liability through new rate design methods.

Senator Johnston, cont.

The Commission is scheduled to consider an interim rule dealing with the Court's remand at its next public meeting, on July 28, so that such a rule may be issued before the mandate issues. As soon as that action is completed, I will forward a copy to you and the other members of the Committee. Although I cannot speak for the Commission until that time, I feel confident that my colleagues join me in wanting to establish a reasonable balance and reconcile any tension between open access transportation and past supply commitments. It is important to note that the Commission alone will not be able to solve all of the industry's take-or-pay problems. Our jurisdiction, of course, is limited, not only at the wellhead but also at the citygate. The activities of the local distribution companies, which are major participants in the natural gas industry, are subject to state jurisdiction. Notwithstanding those limitations, I believe we will be able to craft a rule responsive to the Court's decision.

Senator Johnston, cont.

Question 2: The Court strongly suggested that the Commission condition access to producers in order to resolve take-or-pay claims.

(a) Will the Commission do this?
(b) Why or why not?
(c) How would this work?
(d) Unless a national plan were put into place could not the producers with take-or-pay claims access pipelines with whom they have no take-or-pay problems and avoid the pipelines with whom they have problems?

Answer 2: Conditioning access to producers in order to resolve take-or-pay claims is one of the options being considered by the Commission in light of the Court's decision. At this time, I am unable to say whether or why the Commission will or will not take this action, since the Commission's consideration of the Court's remand is pending.

Senator Johnston, cont.

Question 3: Conditioned access addresses primarily future take-or-pay costs. What steps will the Commission take to deal with the past take-or-pay costs already incurred?

Answer 3: In March 1987, the Commission issued a proposed policy statement on the recovery of past take-or-pay costs. The Commission is reviewing and considering both the comments submitted on the proposed policy statement and the AGD Court's guidance in formulating a final policy. The Commission intends to act on both the issues remanded by the court and the proposed policy statement in the near future.

Several pipelines have filed specific proposals for the collection of take-or-pay costs. Initial decisions by administrative law judges have been issued on proposals made by Transwestern Pipeline Company and Tennessee Gas Pipeline Company. Initial decisions on the proposals filed by other pipelines should be issued in the near future. The Commission intends to act on these specific take-or-pay proposals by the end of the year.

Senator Johnston, cont.

Question 4: In your press conference on June 24, 1987, you stated that you felt that the Commission's present proposed take-or-pay policy statement is a sufficient response to the Court's demand for definitive take-or-pay action. Is this currently your position? Why or why not?

Answer 4: The Commission's proposed policy statement on the recovery of take-or-pay buy out and buy down costs is very important to the resolution of a problem which transcends the present. It recognizes that the problem permeates the entire industry and that the cause is difficult to attribute to any particular segment. Until the liabilities associated with the past are extinguished, the transition to a market responsive natural gas industry will be impaired. The policy statement is intended to facilitate that goal. Accordingly, I believe that statement is responsive to the Court's concerns on take-or-pay. Nevertheless, I am committed to exploring every option to respond to the Court in order to achieve a reasoned decision.

Senator Johnston cont.

Question 5: On page 85 of the Court decision, the Court noted that the Commission's power to directly restrict pipelines from passing through costs is limited to cases of fraud and abuse or imprudent costs. The Commission's proposed policy statement would arbitrarily deny passthrough of 50% of prudently incurred costs. Isn't denial or passthrough of prudent costs totally inconsistent with the Commission's power as set forth by the D.C. Circuit?

Answer 5: Under the proposed policy statement pipelines are permitted to choose between filing under the policy statement or filing to recover its costs in a rate case. In other words, the pipeline may or may not wish to voluntarily absorb an equitable share (i.e. 50%) of the costs of buying out its take-or-pay liability in order to assure collection of the remainder of those costs. It should be emphasized that nothing in the policy statement denies or is intended to deny a pipeline the opportunity of recovering all of its prudently incurred costs. Ultimately, the Commission continues to believe that as cases are presented and resolved, there should be an equitable sharing of take-or-pay costs between all segments of the industry, including producers, pipelines, distributors and consumers.

The proposed policy statement does not establish a rule, but simply lays out principles which the Commission will consider in individual cases. The thrust of the statement is that the Commission believes that an equitable sharing (defined as 50-50) of take-or-pay buyout and buydown costs justifies demand classification of such costs by a pipeline. However, the 50-50 cost sharing formula was not intended to be iron-clad or to preclude adjustments which might be found to be reasonable or necessary based on the facts of a particular case. Nor was it intended to preclude pipelines, their customers and other interested parties from agreeing to a different formula for settlement purposes.

Senator Johnston, cont.

Question 6: You have justified your 50/50 passthrough proposal in the past by stating that it is just another gate to the present policy of 100% commodity treatment. In today's spot markets, pipelines cannot increase their commodity rates at all without losing more sales and exacerbating take-or-pay. Commodity treatment is essentially flat denial of passthrough. Is this not just another example of giving pipelines a choice between "the noose and the firing squad" which the Court condemned with respect to the "voluntary nature" of Order 436?

Answer 6: The Commission's 50/50 passthrough proposal is offered as a viable alternative to the existing 100% commodity treatment for take-or-pay. It is based on the premise that neither the pipeline nor its customers are totally responsible for take-or-pay problems and that the pipeline should bear some of the burden. Pipelines who choose this option are allowed to collect 50% of their take-or-pay settlement costs directly.

The Commission is not obligated to guarantee pipelines recovery of their costs. It is simply obligated to provide a reasonable opportunity for pipelines to recover their prudently incurred costs. In the Commission's judgment, the 100% commodity option fulfills this obligation. Prudence can always be challenged by the pipeline's customers.

It is speculative to assert that pipelines cannot increase currently their commodity rates at all without losing more sales and exacerbating take-or-pay. The statement assumes that customers have access to alternative sources of supply and would switch suppliers. Some customers do not have the option of seeking cheaper sources of supply. Transportation of spot market gas to customers of non-436 pipelines may not be an existing alternative for those customers.

Senator Johnston, cont.

Question 7: Under the Natural Gas Act, pipelines have service obligations to many if not most of their customers, i.e., an obligation to keep reserves of gas necessary to fulfill service to that customer. In this era of competition, however, customers of the pipelines are being given the opportunity and encouragement to buy gas from other sources. Are pipelines still under a legal obligation to maintain reserves and can they realistically maintain reserves if customers are not buying gas from the pipelines?

Answer 7: Pipelines are under an obligation to comply with the terms of their certificates. Requirements to maintain reserves are not, in all cases, a specific requirement of the certificate obligation. Once commenced, service must continue until abandonment authorization is obtained.

The Commission recognizes that pipelines may incur costs to maintain long-term supplies to meet their customers' service requirements. To enable pipelines to currently reflect these costs in their rates, the Commission is considering currently whether pipelines should be permitted to include a gas inventory charge as part of their tariffs. This would allow pipelines to charge their customers on a current basis for the cost of maintaining adequate supplies to meet the customers' requested levels of service. This charge would also send appropriate price signals since customers would see the full cost of their purchase decisions on a current basis.

Senator Johnston, cont.

Question 8: Current FERC policy may make it more attractive for large users of gas currently served by local distribution companies (LDCs) to jump to a different supplier, bypassing the LDC. That may be good for them but leaves the LDC and its other customers holding the bag for the fixed costs associated with providing service to that customer who is big enough to shop around for cheap gas. Who should bear responsibility for authorizing bypass of an LDC system, the FERC or the state Commission? If the FERC is going to do it, what tools do you leave the state regulators to ensure that the captive customers don't end up with the short straw, paying even higher fixed costs because they can't afford the alternatives of a "competitive" market ?

Answer 8: Current FERC policy is to evaluate each case based on the individual circumstances of the particular proceeding. Bypass typically involves a transportation or sale in interstate commerce for resale and the construction and operation of a tap on the interstate pipeline. These activities fall under FERC's jurisdiction pursuant to the NGA or NGPA. Therefore, bypass cannot occur without a proceeding under NGA Section 7 (including the optional certificate and the prior notice procedure). This affords all interested parties the opportunity to participate. Alternatively, NGPA Section 311 requires notification of the LDC and the state PUC prior to commencing service. Application of this policy has resulted in some bypass proposals being approved (ADC Alabama and Panhandle-Hayes Albion) and others being set for hearing (ANR, ANR-Techstaff and Panhandle-IPAMS).

The actual impact on the LDC's customers is determined by the state PUC. That, in turn, depends on whether the LDC seeks a rate increase as a result of the bypass. As recognized by the court in the AGD decision, the PUCs have several tools available to respond to this situation that depend on individual state laws. For example, if bypass is attractive to the end user, it may be the result of industrial rates being used to subsidize residential consumers. PUCs can therefore respond by adopting more strictly cost-based rate designs. Additionally, PUCs may control bypass by virtue of their jurisdiction over the facilities themselves, such as those connecting the end user to the interstate pipeline tap. Furthermore, in the event bypass does occur, captive consumers might be protected by rate design modifications so that LDC shareholders, rather than ratepayers, bear the consequences. Finally, the PUCs strongly affect the LDCs' market behavior by regulating their purchasing practices and transportation policies.

Senator Johnston, Cont.

Question 9: You have stated in the past that the ultimate impact of a bypass on the LDC's customers is determined by the state PUC through its ratemaking procedures. However, you have also stated that bypass typically involves a transportation service subject to FERC rates. How can a state Commission fairly allocate costs due to bypass when the service may be solely under Federal jurisdiction? Aren't you usurping states' authority to allocate costs?

Answer 9: In a bypass situation where the LDC is no longer involved, either in transporting the end user's own gas supply or in providing back-up sales service, the LDC no longer tenders bills to the end user. In such a situation, the nexus between the LDC and end user no longer exists. The state PUC might be unable, therefore, to allocate to that end user, through the LDC's rates and charges, any portion of the LDC's cost of service. The state PUC retains, however, the authority to determine whether any of those costs should be absorbed by the LDC's remaining customers or by the shareholders of the LDC. For instance, if a particular facility on the LDC's system is rendered unnecessary as a result of a bypass, the state PUC has authority to determine whether the associated costs should be removed from the LDC's cost of service or whether those costs should be absorbed by the LDC's remaining customers. Further, in those situations where an end user is still under contract to purchase gas from the LDC, but nevertheless has chosen to depart from the LDC's system, the state PUC might chose to condition an end user's departure from the system on some form of exit fee or other arrangement that would offset the resultant cost consequences to the LDC or to its remaining customers.

The FERC's exercise of jurisdiction in a bypass situation extends to the transportation of the gas in interstate commerce and the construction and operation of any related facilities. The exercise of that jurisdiction involves a determination that the transportation is in the public interest, that it is neither unduly discriminatory nor preferential, and that the rate charged by the participating interstate pipeline is both just and reasonable. The FERC does not regulate the underlying activities of the LDC which may have rendered the bypass economic. The state Commission retains full authority to examine those activities and to determine, based on the purchasing practices or other conduct of the LDC, what would be a fair allocation of the costs arising from a bypass. FERC rate approval serves only to allocate costs on the interstate pipeline's system and does not suggest any form of cost allocation with respect to the LDC, its customers or the end user. FERC approval of an interstate pipeline's transportation rate, therefore, does not usurp the states' authority to allocate costs on the LDC's system.

Senator Johnston, cont.

Question 10: Judge Mikva, in his concurring opinion in the D.C. Circuit opinion on Order No. 436, thinks the Commission's optional expedited certification procedures intrude on state authority and make it easier to bypass LDC's. The result is to allow the FERC to override the states' ability to make such policy choices. What, in your opinion, can be done to correct this inequity?

Answer 10: The optional expedited certificate regulations provide that a qualifying application gives rise to a presumption that the application is in the public interest. That presumption, however, is subject to rebuttal by potentially aggrieved parties. Further, the OEC regulations require that an applicant, prior to filing an OEC application, serve copies of the application on any LDC in the affected service area and the LDC's state regulatory agency. LDCs and state agencies may use this opportunity to rebut the presumption that an OEC application by a pipeline to bypass an LDC is in the public interest by showing circumstances demonstrating that the bypass would be unfair. (See Order No. 436, [Reg. Preambles 1982-1985] FERC Stats. & Regs. ¶ 30,665, at 31,572). It is true that the simple fact that a pipeline is offering service under more competitive terms than an LDC is not, by itself, sufficient grounds to deny an OEC application. The LDC or other intervenor must set forth the specific allegations of unfair competition or other material harm that will result from the new service so as to demonstrate why it would be inconsistent with the public convenience and necessity to issue the OEC certificate. (Id. at 31,584)

The Commission stated in Order No. 436 that individual protests in cases involving LDC bypass would be addressed on a case-by-case basis. Since no LDC has claimed that it would be bypassed as a result of any of the few OEC applications filed to date, the Commission has not had the occasion to develop criteria regarding the kind and degree of material harm to an LDC or its customers that would be necessary to rebut the presumption that granting an otherwise qualifying OEC application is in the public interest. In upholding the OEC regulations, the D.C. Circuit majority stated:

> Finally, we note that the presumption created by the OEC procedures is rebuttable. We cannot know at this point precisely what will be necessary to persuade the Commission that application of the presumption is inappropriate. But the existence of that backstop confirms our judgment that the OEC rules themselves can readily be applied in a manner consistent with the congessional purposes.

Associated Gas Distributors v. FERC, No. 85-1811 (D.C. Cir. June 23, 1987) slip opinion at 110.

Senator Johnston, cont.

In any OEC proceeding, the Commission will consider all evidence submitted on the effect of bypass on the viability of any LDC and rates paid by the LDC's customers, as well as information bearing on the LDC's ability to meet competition by the OEC applicant. So far, however, only a few applications have been filed under the OEC procedures, and in the absence of a developed body of Commission precedent, I would be reluctant to speculate on the hypothetical circumstances under which granting an OEC application would create inequitable results that might be deemed to override the intended purpose of creating an incentive for economic efficiency by all market participants, including LDCs.

Adoption of the OEC regulations signaled a departure from previous Commission policy generally disallowing bypass of LDCs. However, these procedures do not, as recognized in the majority opinion in Associated Gas Distributors v. FERC, in any way intrude upon or diminish the authority of state agencies to control the risk of bypass. As noted by the court, state agencies can avoid bypass by adopting rate designs that are more strictly cost-based, by requiring an LDC's shareholders (rather than its customers) to bear burdens created by the LDC's inability to compete, by taxing gas sales to industrial customers, or, possibly, by exercising "their jurisdiction over the bypassing transportation itself". (Id. at 107-108).

Senator Johnston, cont.

Question 11: The Commission recently issued an order in East Tennessee Natural Gas Co., Docket No. CP86-275-000, where it conditioned authorization for East Tennessee to sell natural gas to Atlanta Gas Light Company as follows:

> East Tennessee shall not operate the proposed facilities interconnecting with Atlanta Gas until the Director of the Office of Pipeline and Producer Regulation has reviewed and approved a cultural resources survey and mitigation plan and has considered any comments by the Georgia State Historic Preservation on the pipeline planned by Atlanta Gas, prior to its construction.

This order appears to raise a few questions regarding the Commission's responsibility and authority under the National Historic Preservation Act.

Question 11(a): In your view, is the Commission required under Section 106 of the National Historic Preservation Act to make a supplemental investigation and determination that construction of facilities by a gas distributor which is exempt from the Commission's jurisdiction under the Natural Gas Act will have no adverse effect on cultural resources if the appropriate State Historic Preservation Officer has made a determination that has been concurred in by the U.S. Advisory Council on Historic Preservation?

Answer 11(a): The Commission issued an order on June 5, 1987 in East Tennessee Natural Gas Company, Docket No. CP86-275-000, which was misprinted in the original published version and later corrected by errata notice. The corrected portion reads as follows:

> (G) East Tennessee shall not operate the proposed facilities interconnecting with Atlanta Gas until the Director of the Officer of Pipeline and Producer Regulation has reviewed and approved a cultural resource survey and mitigation plan and has considered any comments by the Georgia State Historic Preservation Officer and the Advisory Council on Historic Preservation on the pipeline planned by Atlanta Gas, prior to its construction.

Section 106 of the National Historic Preservation Act requires the Commission to take into account the effect of any undertaking certificated by the Commission on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places. The statute further requires the Commission to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the undertaking. However, Congress has given the Commission, not the State Historic Preservation Officer or the Advisory Council on Historic Preservation, the ultimate authority and responsibility for those two tasks.

Senator Johnston, cont.

Because the Atlanta Gas facilities are inextricably related to and completely dependent upon the issuance of a certificate to East Tennessee, the Commission must consider the effects of the combined undertaking on historic properties. (See, e.g. Alice Henry v. Federal Power Commission, 513 F.2d 395 (D.C. Cir 1975), requiring the Commission to consider environmental impacts in non-jurisdictional settings related to jurisdictional facilities; and Colorado River Indian Tribes v. Marsh, 604 F. Supp. 1425 (S.D. Cal. 1985), requiring federal agencies to consider potential harm to historic properties outside the jurisdictional area under permit.)

The statute does not require the Commission to make supplemental investigations and determinations, per se, after having received determinations from the appropriate State Historic Preservation Officer and concurrence by the Advisory Council on Historic Preservation. On the other hand, the Commission may make any investigations and determinations it deems necessary to ensure compliance with its duties under the statute.

Question 11(b): Does the Commission have discretion under Section 106 of the National Historic Preservation Act to rely upon the determination of a State Historic Preservation Officer and comments by the U.S. Advisory Council on Historic Preservation that construction not otherwise subject to the Commission's jurisdiction will not have an adverse effect on cultural resources?

Answer 11(b): The Commission, in meeting its statutory responsibilities described above, has discretion under Section 106 of the National Historic Preservation Act to consider and give appropriate weight to the determination of a State Historic Preservation Officer and the comments of the Advisory Council on Historic Preservation that construction not otherwise subject to the Commission's jurisdiction will not have an adverse effect on cultural resources.

Question 11(c): In your view, does the language from the Order quoted above require or permit the Director of the Office of Pipeline and Producer Regulation to do more than review and approve the survey and plan which the distributor has agreed to implement and to consider the comments of the State Historic Preservation Officer in that review?

Answer 11(c): The language from the Commission's order quoted above requires the Director of the Officer of Pipeline and Producer Regulation to take two steps prior to the operation by East Tennessee of the proposed facilities interconnecting with Atlanta Gas: (1) review and approve a cultural resource survey and mitigation plan; and (2) consider comments by the Georgia State Historic Preservation Officer and the Advisory Council on Historic Preservation. In order to meet the requirements of Section 106 that the Commission take into account the effect of the undertaking on historic properties listed in or eligible inclusion in for the National Register of Historic Places, the Commission must have before it competently collected facts and proposals for assessment and mitigation, if any mitigation is necessary. Upon completion of his review of a cultural resource survey and mitigation plan, the Director of the Office of Pipeline and Producer Regulation will forward copies of the plan to the Georgia State Historic Preservation Officer and the Advisory Council on Historic Preservation and allow them a reasonable time for comment. After reviewing those comments, the Director will then give his approval or disapproval of the survey and mitigation plan.

Senator Johnston, cont.

Question 12: In considering the interpretation of the affiliated entities test, was the Commission aware of and/or did the Commission take under consideration regulations that were proposed by the Minerals Management Service in the February 13, 1987 Federal Register regarding affiliate pricing for federal royalty valuation purposes? Does the FERC feel any obligation to assist in reconciling what could possibly be two conflicting rules, each imposed by a separate agency of the same government?

Answer 12: The Commission was aware of the Minerals Management Services' ("MMS") Notice of Proposed Rulemaking on gas royalty valuation regulations when it issued its own Notice of Proposed Rulemaking in Docket No. RM86-14-000, 52 Fed. Reg. 20628 (1987) to, among other things, establish standards to apply the affiliated entities test, although the Commission did not address the MMS proposal in the Commission's proposed rule.

The MMS proposal appears to involve a market-oriented test establishing comparability of affiliate and non-affiliated transactions for the purpose of determining royalty value. The NGPA section 601(b)(1)(E) affiliated entities limitation, which the Commission has proposed to implement, is also a market-oriented comparability test. Because both agencies appear to be moving in the same direction, I do not anticipate that a conflict will arise. I am, of course, interested in avoiding any such conflicts. I will ensure that the Commission specifically takes into account the MMS proposal when it considers its final rule in Docket No. RM86-14-000.

Senator Johnston, cont.

Question 13: In interpreting the affiliated entities test, did the Commission seek input from state conservation regulators and/or give consideration to state laws which affect the royalty obligation of all producers, including affiliated producers? Examples of such state laws include definition of market value for affiliated transactions and the obligation of the producer to maximize, in marketing, the value of the lessors' lease.

Answer 13: On May 28, 1987, the Commission issued a Notice of Proposed Rulemaking (NOPR) in Docket No. RM86-14-000 which, among things, calls for public comments by August 3, 1987, on proposed section 157.307 of the Commission's regulations. That section would implement the affiliated entities limitation contained in section 601(b)(1)(E) of the NGPA. Although the Commission is generally aware of these state royalty laws and royalty obligations (which are beyond our jurisdiction), it did not specifically address or seek comments on what implication, if any, they may have on the proposed rule. However, while the NOPR does not specifically call for comments on this issue, any person, including state officials, may file comments by August 3, 1987, expressing views on the implications of such state royalty laws on the proposed rule.

Senator Johnston, continued

Question 14: Did the Commission consider the discriminatory effects that the affiliated entities test, as enunciated in Opinion 269 in the Tennessee Gas Pipeline case, would have against affiliated gas producers? Examples of such discrimination include the state law obligation to pay royalty and severance taxes based on "market value" (i.e., proceeds received in non-affiliate transactions) where the actual proceeds received, under the FERC's proposed affiliated entities test, for the same transaction would be potentially considerably less. If such discrimination were allowed to stand, wouldn't it likely result in early plugging and abandonment of wells and be a disincentive to compete equally with other producers for leases?

Answer 14: As no party raised these issues in this proceeding, Opinion No. 269 did not address them. However, we wish to emphasize that, as suggested in the NOPR in Docket No. RM86-14-000 discussed above, Opinion No. 269 did not establish uniform standards to be applied on a generic basis and is, rather, a case-specific disposition. Such generic standards are proposed in the NOPR in proposed section 157.307. Further, because Opinion No. 269 is pending on consideration of requests for rehearing, it would be inappropriate to respond to your specific inquiries. We note that the "Undersigned Affiliate Gas Producers" have filed a motion to intervene out-of-time in the Tennessee proceeding, Docket No. TA82-2-9-000, et al., and raised similar issues regarding state royalty laws in an associated request for rehearing of Opinion No. 269. The Commission has not yet acted on the request to intervene and, in the interim, has granted their request for rehearing solely for the purpose of further consideration of the issues raised in their request for rehearing.

Senator Johnston, cont.

Question 15: Has the Commission determined whether affiliated or non-affiliated producers are more actively engaged in active exploration and production?

Answer 15: The June 1984 EIA publication "Drilling and Production Under Title I of the Natural Gas Policy Act", contains the latest compilation of affiliated versus non-affiliated producer exploration activities. This report shows that pipeline affiliate market share rose from 4% in 1978 to 6% in 1982 based on production from post-NGPA wells. Since this production represents newly drilled wells, it would also provide some measure of exploration activity. We are not aware of any other quantitative information available on this subject although indicators point to decreased industry exploration activity in recent times.

Senator Johnston, cont.

Question 16: Did the Commission consider how such premature abandonment of wells would affect state royalty and severance tax revenues?

Answer 16: The affiliated entities test utilizes rates established by market forces and therefore would not result in premature abandonment of wells or adversely affect state royalty or severance tax revenues. The test merely ensures that affiliate production is not afforded preferential rates to the detriment of non-affiliated production. Moreover, we believe that present Commission policy discourages the premature abandonment of wells and enhances state royalty and severance taxes revenues. This policy, as enunciated in Order No. 451, seeks to maximize the ultimate recovery of old gas through the establishment of an alternate maximum lawful price which more accurately reflects the true value of natural gas. Second, the Commission's recent Notice of Proposed Rulemaking in Docket No. RM87-16 would permit the abandonment of sales under expired or otherwise terminated contracts. This proposal would permit the subsequent sale of this gas at market conditions with minimal regulatory restraints. In summary, Commission efforts are designed to maximize the ultimate recovery of natural gas which should have a beneficial effect on state royalty and severance tax revenues.

Senator Johnston, cont.

Question 17: Due to the MMS proposal maximizing royalty due the federal government (and on Indian land leases), did the Commission consider that its treatment of affiliated entities pricing would result in private landowners possibly receiving less royalty than the federal government is proposing for itself?

Answer 17: The Commission does not have any jurisdiction over royalty payments made to royalty owners. This is a private contractual matter between the royalty owners and producers. Some royalty owners are able to enter into agreements more favorable than others. However, these royalty agreements have no bearing on the prices allowed to be charged by affiliated entities. We do not believe that our proposed rules will favor or discriminate against private or government royalty owners. We will consider this issue if raised in the final rule on the affiliated entities test.

Senator Johnston, cont.

Question 18: Has the Commission considered the anti-trust implications of requiring producers to obtain pricing information of other producers in order to perform the weighted average calculations? Additionally, has the Commission considered the time frame which would elapse between gathering such information as opposed to the time in which the royalties must be paid?

Answer 18: Under the proposed regulations only pipelines engaged in affiliate transactions would be required to submit information on a monthly basis concerning their gas purchases for the purpose of establishing a data base to compare the prices they pay to affiliates with the prices paid between unaffiliated companies. Producers would not be required to gather or submit to the Commission any information under the proposed rule. As a result, the Commission has not considered any anti-trust implications for producers or the timing between the gathering of the information by the pipeline and producer royalty payments. I should note, in addition, that the pipeline's monthly data submission should have no effect on pipeline payments to their producer suppliers.

Senator Johnston, cont.

Question 19: Did the Commission consider what long-range price and supply impacts would be felt by consumers because of the proposed affiliated entities test?

Answer 19: The proposed affiliated entities test is intended to ensure that pipelines do not pay their affiliates higher prices than are being paid to non-affiliated producers. Commments on the proposed test are due on August 3, 1987. The Commission anticipates that the comments will address the long term price and supply effects of the proposal. These will be considered in formulating a final rule on the affiliated entities test.

Senator Johnston, cont.

Question 20: Would a better approach be to limit transfer pricing to a market value concept? Isn't the Commission's approach inconsistent with arriving at actual market value?

Answer 20: Section 601(b)(1)(E) of the NGPA provides that an interstate pipeline cannot pass through to its customers payments to affiliates which exceed the amounts paid in comparable transactions involving non-affiliates. The Commission has proposed that this standard would be met if the price paid to the affiliate does not exceed the average of the prices paid to non-affiliates. The Commission believes that this will ensure that affiliates will be paid no more than the average market value paid to non-affiliates. The Commission does not believe that the proposed affiliated entities test is inconsistent with the market value concept.

Senator Johnston, cont.

Question 21: Please indicate the number of initial decisions now pending before the Commission for action, the date each was issued by the Administrative Law Judges, and when you expect the Commission to place them on its Agenda for action.

Answer: In the electric rate area, there are thirty-five pending initial decisions involving issues raised under section 205 and 206 of the Federal Power Act. Over the last year, the Commission acted on seventeen such initial decisions. This represents a dramatic increase over the previous two years when only four initial decisions were acted on.

In the natural gas and oil area, there are forty-five pending initial decisions involving issues raised under sections 4, 5, and 7 of the Natural Gas Act, section 311 of the Natural Gas Policy Act, and section 15(7) of the Interstate Commerce Act. Since October 1, 1986, the Commission has acted on eighteen such initial decisions. In the last year Commission resources have been focused on implementation of open access transportation on interstate pipelines. With the court's affirmance of the Commission's authority in this area, I expect that substantial resources can now be devoted to increasing the Commission's productivity on pending initial decisions.

It is difficult to predict, however, when the pending initial decisions will be scheduled for the Commission's agenda. Many of these cases involve very complex technical and legal issues. In tackling this backlog, we have endeavored not only to act on the older cases first but also to address those initial decisions that raise significant policy issues. I can assure you that I will continue to see that measures are taken to ensure that the increased productivity in this category is maintained.

A list of the initial pending decisions and the date each was issued by the Administrative Law Judge is set forth on the following pages.

Senator Johnston, cont.

PENDING INITIAL DECISIONS - ELECTRIC

Pacific Gas & Electric, E-7777	July 1, 1983/Feb. 10, 1984
New England Power Co., ER83-647	June 20, 1984
Southern California Edison, ER81-177-002	May 18, 1984
Attorney Gen. v. New England Power Co., EL84-6	December 18, 1985
Boston Edison Co., ER83-726	October 29, 1985
Niagara Mohawk, ER85-109	October 1, 1985
Seminole Electric Coop, EL83-24	September 13, 1985
Southwestern Public Service Co., ER84-604	November 6, 1985
Utah Power & Light, ER84-571	October 1, 1985
Alamito Co., ER79-97-002	December 31, 1986
A E P Serv. Corp., ER84-348-001	December 30, 1986
Arkansas Power & Light Co., ER83-297-005	October 16, 1986
Boston Edison Co., ER84-705	January 22, 1986
Central and South West Service Co., ER84-31	April 8, 1986
Duke Power Co., ER84-177	February 28, 1986
New England Power Co. (Phase I), ER85-646-001	October 30, 1986
Pacific Power & Light, ER86-25	July 18, 1986
South Carolina Generating Co., ER85-204	February 20, 1986
Southern California Edison, ER76-205	March 4, 1986
Southern California Edison, ER79-150	October 21, 1986
Southern California Edison, ER82-427	January 17, 1986
Southern California Edison, ER84-75-000	November 7, 1986
Southwestern Electric Power Co., ER85-424	January 23, 1986
Southwestern Public Service Co., ER85-477-002	November 6, 1986
New England Power Co. (Phase II), ER85-646	February 17, 1987
Utah Power & Light (Phase II), ER84-571	March 10, 1987
Allegheny Generating Co., EL86-37	April 9, 1987
Connecticut Power & Light, ER85-720	April 17, 1987
Kansas Gas & Electric, ER85-461	April 24, 1987
Gulf States Utilities v. Southern Co., EL86-53	May 12, 1987
Southern California Edison (Phase II), ER84-75-007	June 26, 1987
Yankee Atomic, EL87-21-001	July 6, 1987
Vermont Yankee, EL87-22-001	July 9, 1987
Connecticut Yankee Atomic, EL87-23-001	July 10, 1987
Wisconsin Electric, ER85-785-009	July 9, 1987

Senator Johnston, cont.

Pending Initial Decisions - Oil and Natural Gas

East Tennessee Natural Gas Company, RP82-124	January 23, 1985
Tennessee Gas Pipeline Company, RP82-125	April 1, 1985
Midwestern Gas Transmission Company, RP84-34	April 29, 1985
Northwest Pipeline Corporation, RP81-47	May 29, 1985
Tarpon Transmission Company, RP84-82	July 15, 1985
Colorado Interstate Gas Company, CP73-184	July 24, 1985
Transcontinental Gas Pipeline Corp., TA85-1-29	September 3, 1985
United Gas Pipe Line Co., RP84-42-001	September 3, 1985
Transcontinental Gas Pipeline Corp., TA85-3-29	October 31, 1985
Transcontinental Gas Pipeline Corporation, RP85-31	November 8, 1985
Southern Natural Gas Company, RP83-58	November 13, 1985
Northwest Central Pipeline Corp., TA84-2-43	December 9, 1985
Wyoming Interstate Company, Ltd., RP85-39	January 17, 1986
Distrigas of Mass Corporation, RP85-125	January 24, 1986
Panhandle Eastern Pipe Line Company, TA84-2-28	February 6, 1986
National Fuel Gas Supply Corp., TA85-1-16	February 21, 1986
East Tennessee Natural Gas Company, RP85-47	March 10, 1986
Distrigas of Mass Corp., RP85-165-000	March 27, 1986
Northwest Central Pipeline Corp., RP82-114	April 17, 1986
Producer's Gas Company, ST81-106	May 12, 1986
Colorado Interstate Gas Company, RP85-122	May 13, 1986
Northwest Pipeline Corporation, TA83-1-37	May 29, 1986
Montana-Dakota Utilities Company, RP84-62	May 30, 1986
Texas Gas Transmission Corp., TA85-1-18	July 2, 1986
Trailblazer Pipeline Company, RP84-94	July 14, 1986
Amoco Production Company, et al., IN83-1	August 4, 1986
KN Energy Inc., RP85-11	August 8, 1986
El Dorado Interstate Transmission, CP86-205	October 27, 1986
Mountain Fuel Resources, Inc., RP86-7	October 29, 1986
Panhandle Eastern Pipe Line Company, RP85-194	January 8, 1987
Transcontinental Gas Pipe Line Corp., TA85-3-009 et al	February 12, 1987
Northern Natural Gas Co., RP85-206-003	February 13, 1987
Trunkline LNG Company, RP81-85	February 17, 1987
Consolidated Gas Transmission Corporation, RP85-169	March 3, 1987
Panhandle Eastern Pipe Line Co., RP85-203	March 4, 1987
Texas Eastern Transmission Corp., RP85-177	March 6, 1987
Overthrust Pipeline Company, RP85-60	March 13, 1987
Midwestern Gas Transmission Company, RP86-33	April 9, 1987
Southern Pacific Pipe Line Company, IS85-15	April 30, 1987
Algonquin Gas Transmission Company, RP86-41	May 12, 1987
Transwestern Pipeline Company, RP86-126	May 13, 1987
Mobil Exploration and Producing North America, Inc., IN86-5-000 (Phase I)	May 26, 1987
Texas Eastern Transmission Corp., TA85-4-17	June 9, 1987
Stowers Oil and Gas Company, et al., GP84-23	July 1, 1987
Tennessee Gas Pipe Line, RP86-119-000	July 9, 1987

Senator Johnston, cont.

Question 22: Please provide a description of the Commission's processes which separate staff functions between advisory and litigation. Describe how the integrity of the Commission's adjudicatory function is ensured in hydroelectric, electric power and natural gas adjudication.

Answer 22: Under the Commission's separation of functions rule, employees who serve on the trial staff in an adjudication are barred from serving as advisors to the Commission in the same proceeding or a factually related case. To maintain this separation, the Office of the General Counsel (OGC) is organized into separate advisory and litigation units. For example, OGC's Gas and Oil Division consists of three advisory sections (Pipeline Rates and Valuation, Pipeline Certificates, and Producer Regulation) and one administrative litigation office (Gas and Oil Litigation). Similarly, the Hydroelectric and Electric Division consists of two advisory sections (Electric Rates and Corporate Regulation and Hydroelectric Licensing) and one administrative litigation unit (Hydroelectric and Electric Litigation). Lawyers in the litigation sections do not advise the Commission on the merits of litigated cases, and advisory staff, including the General Counsel, Deputy General Counsel and Associate General Counsels, do not participate in the conduct of any administrative "trial" or in developing trial strategy.

Senator Johnston, cont.

Question 23: Under DOE's oil pricing overcharge program FERC is directed to review the disposition of certain enforcement actions by the Economic Regulatory Administration. To date, ERA has certified several cases to the Commission under the so-called "layering" rule (C.F.R. Section 212.186). What is the current status of FERC review of these proceedings and what is the prospect for completing Commission review?

Answer 23: There are now 23 "layering" cases pending before the Commission. Four of these, Fuel Oil Supply Corp., Petrotech, P&R Trading Company, and Erickson Petroleum, are awaiting a Commission decision. Nineteen other cases are pending before Commission administrative law judges. The Commission expects to reach a decision on the major common issues in the first four cases this fall. The resolution of these issues should provide guidance on the handling of the other pending cases and should substantially speed up the processing of those cases.

Senator Johnston, continued

Question 24: In your recent speech to the Edison Electric Institute, you suggested that there are two paths which FERC might take in order to improve the implementation of PURPA.

(a) Fine-tuning the existing regulations, including the concept of regulatory determination of avoided cost.
(b) Adopting a market-oriented system, with costs determined by competitive bidding.

You have indicated your intention to follow the second path and make it a voluntary option for the states. Assuming that not all states will opt for adopting a bidding system, wouldn't it make sense also to pursue the first path as a complimentary policy?

Answer 24: Yes. The voluntary bidding system will provide additional market driven means of evaluating electric generating capacity. The existing regulations have formed the basis for extensive implementation work and fine-tuning them to improve the efficiency of the program is completely consistent with developing guidelines on bidding systems.

In particular, the existing regulations on avoided capacity costs need to be clarified, definitions of allowable waste fuels need to be refined and technical requirements for qualifying facility status need to be reviewed. These efforts should be develop simultaneously with the development of the second path and I have recommend that this be done. The second path provides new opportunities to introduce market determined prices but it does not preclude doing the things that need to be accomplished the first path.

Senator Johnston, continued

Question 25: Existing statutory schemes may impose significant obstacles to achieving a "level playing field" in a competitive bidding system. For example:

- o Small power producers are limited to certain technologies and sizes.
- o Utilities cannot own more than 50% of a qualifying facility.
- o The Public Utility Holding Company Act is an obstacle both to outside corporations (GE, Becthel, etc.) and to utilities that wish to become Independent Power Producers.

In the short term, these problems can perhaps be worked around. But in the long term, don't you think that statutory change may be desirable?

Answer 25: The Commission staff is currently reviewing legal impediments to equal treatment among all technologies, fuels and ownership types. Some of these distinctions serve useful economic and legal purposes. If the uses of these distinctions remain valid, they should not be changed. After reviewing these issues, any changes that are needed will be identified and statutory changes will be suggested.

Questions For the Record From Senator Bumpers

Question 1: Current FERC policy may make it more attractive for large users of gas currently served by local distribution companies (LDCs) to jump to a different supplier, bypassing the LDC. That may be good for them but leaves the LDC and its other customers holding the bag for the fixed costs associated with providing service to that customer who is big enough to shop around for cheap gas. Who should bear responsibility for authorizing bypass of an LDC system, the FERC or the state Commission? If the FERC is going to do it, what tools do you leave the state regulators to ensure that the captive customers don't end up with the short straw, paying even higher fixed costs because they can't afford the alternatives of a "competitive" market ?

Answer 1: Current FERC policy is to evaluate each case based on the individual circumstances of the particular proceeding. Bypass typically involves a transportation or sale in interstate commerce for resale and the construction and operation of a tap on the interstate pipeline. These activities fall under FERC's jurisdiction pursuant to the NGA or NGPA. Therefore, bypass cannot occur without a proceeding under NGA Section 7 (including the optional certificate and the prior notice procedure). This affords all interested parties the opportunity to participate. Alternatively, NGPA Section 311 requires notification of the LDC and the state PUC prior to commencing service. Application of this policy has resulted in some bypass proposals being approved (ADC Alabama and Panhandle-Hayes Albion) and others being set for hearing (ANR, ANR-Techstaff and Panhandle-IPAMS).

The actual impact on the LDC's customers is determined by the state PUC. That, in turn, depends on whether the LDC seeks a rate increase as a result of the bypass. As recognized by the court in the Associated Gas Distributors v. FERC decision (AGD), the PUCs have several tools available to respond to this situation that depend on individual state laws. For example, if bypass is attractive to the end user, it may be the result of industrial rates being used to subsidize residential consumers. PUCs can therefore respond by adopting more strictly cost-based rate designs. Additionally, PUCs may control bypass by virtue of their jurisdiction over the facilities themselves, such as those connecting the end user to the interstate pipeline tap. Furthermore, in the event bypass does occur, captive consumers might be protected by rate design modifications so that LDC shareholders, rather than ratepayers, bear the consequences. Finally, the PUCs strongly affect the LDCs' market behavior by regulating their purchasing practices and transportation policies.

Senator Bumpers, cont.

Question 2: You have stated in the past that the ultimate impact of a bypass on the LDC's customers is determined by the state PUC through its ratemaking procedures. However, you have also stated that bypass typically involves a transportation service subject to FERC rates.

How can a state commission fairly allocate costs due to bypass when the service may be solely under federal jurisdiction?

If the transportation service is solely under FERC jurisidiction doesn't that usurp the states' authority to allocate costs?

Answer 2: In a bypass situation where the LDC is no longer involved, either in transporting the end user's own gas supply or in providing back-up sales service, the LDC no longer tenders bills to the end user. In such a situation, the nexus between the LDC and end user no longer exists. The state PUC might be unable, therefore, to allocate to that end user, through the LDC's rates and charges, any portion of the LDC's cost of service. The state PUC retains, however, the authority to determine whether any of those costs should be absorbed by the LDC's remaining customers or by the shareholders of the LDC. For instance, if a particular facility on the LDC's system is rendered unnecessary as a result of a bypass, the state PUC has authority to determine whether the associated costs should be removed from the LDC's cost of service or whether those costs should be absorbed by the LDC's remaining customers. Further, in those situations where an end user is still under contract to purchase gas from the LDC, but nevertheless has chosen to depart from the LDC's system, the state PUC might chose to condition an end user's departure from the system on some form of exit fee or other arrangement that would offset the resultant cost consequences to the LDC or to its remaining customers.

The FERC's exercise of jurisdiction in a bypass situation extends to the transportation of the gas in interstate commerce and the construction and operation of any related facilities. The exercise of that jurisdiction involves a determination that the transportation is in the public interest, that it is neither unduly discriminatory nor preferential, and that the rate charged by the participating interstate pipeline is both just and reasonable. The FERC does not regulate the underlying activities of the LDC which may have rendered the bypass economic. The state Commission retains full authority to examine those activities and to determine, based on the purchasing practices or other conduct of the LDC, what would be a fair allocation of the costs arising from a bypass. FERC rate approval serves only to allocate costs on the interstate pipeline's system and does not suggest any form of cost allocation with respect to the LDC, its customers or the end user. FERC approval of an interstate pipeline's transportation rate, therefore, does not usurp the states' authority to allocate costs on the LDC's system.

Senator Bumpers, cont.

Question 3: Judge Mikva, in his concurring opinion in the D.C. Circuit decision on Order 436, thinks the Commission's optional expedited certification procedures intrude on state authority and make it easier to bypass LDC's. The result is to allow the FERC to override the states' ability to make such policy choices.

What, in your opinion, can be done to correct this inequity?

Answer 3: The optional expedited certificate regulations provide that a qualifying application gives rise to a presumption that the application is in the public interest. That presumption, however, is subject to rebuttal by potentially aggrieved parties. Further, the OEC regulations require that an applicant, prior to filing an OEC application, serve copies of the application on any LDC in the affected service area and the LDC's state regulatory agency. LDCs and state agencies may use this opportunity to rebut the presumption that an OEC application by a pipeline to bypass an LDC is in the public interest by showing circumstances demonstrating that the bypass would be unfair. (See Order No. 436, [Reg. Preambles 1982-1985] FERC Stats. & Regs. ¶ 30,665, at 31,572). It is true that the simple fact that a pipeline is offering service under more competitive terms than an LDC is not, by itself, sufficient grounds to deny an OEC application. The LDC or other intervenor must set forth the specific allegations of unfair competition or other material harm that will result from the new service so as to demonstrate why it would be inconsistent with the public convenience and necessity to issue the OEC certificate. (Id. at 31,584)

The Commission stated in Order No. 436 that individual protests in cases involving LDC bypass would be addressed on a case-by-case basis. Since no LDC has claimed that it would be bypassed as a result of any of the few OEC applications filed to date, the Commission has not had the occasion to develop criteria regarding the kind and degree of material harm to an LDC or its customers that would be necessary to rebut the presumption that granting an otherwise qualifying OEC application is in the public interest. In upholding the OEC regulations, the D.C. Circuit majority stated:

> Finally, we note that the presumption created by the OEC procedures is rebuttable.. We cannot know at this point precisely what will be necessary to persuade the Commission that application of the presumption is inappropriate. But the existence of that backstop confirms our judgment that the OEC rules themselves can readily be applied in a manner consistent with the congessional purposes.

Associated Gas Distributors v. FERC, No. 85-1811 (D.C. Cir. June 23, 1987) slip opinion at 110.

Senator Bumpers, cont.

In any OEC proceeding, the Commission will consider all evidence submitted on the effect of bypass on the viability of any LDC and rates paid by the LDC's customers, as well as information bearing on the LDC's ability to meet competition by the OEC applicant. So far, however, only a few applications have been filed under the OEC procedures, and in the absence of a developed body of Commission precedent, I would be reluctant to speculate on the hypothetical circumstances under which granting an OEC application would create inequitable results that might be deemed to override the intended purpose of creating an incentive for economic efficiency by all market participants, including LDCs.

Adoption of the OEC regulations signaled a departure from previous Commission policy generally disallowing bypass of LDCs. However, these procedures do not, as recognized in the majority opinion in Associated Gas Distributors v. FERC, in any way intrude upon or diminish the authority of state agencies to control the risk of bypass. As noted by the court, state agencies can avoid bypass by adopting rate designs that are more strictly cost-based, by requiring an LDC's shareholders (rather than its customers) to bear burdens created by the LDC's inability to compete, by taxing gas sales to industrial customers, or, possibly, by exercising "their jurisdiction over the bypassing transportation itself". (Id. at 107-108).

Questions For The Record From Senator Ford

Question 1: In its recent decision on Order 436, the Court made it clear that the Commission failed in not acting affirmatively to resolve the take-or-pay issue. Their opinion said "FERC's seeming blindness to the possible impact of Order 436 on take-or-pay liability, and its tendency to elevate into affirmative benefits what are at best pallatives, seem impossible to square with the requirement of reasoned decisionmaking."

Can you assure me that the Commission will take affirmative action to address the take-or-pay problem at the wellhead? What's the schedule? How do you plan to proceed?

Answer 1: I am unable to say what action the Commission will take to address the take-or-pay problem at the wellhead. The Commission is examining numerous options, including those suggested by the Court (conditioning producers' access to transportation on their granting pipelines take-or-pay relief and taking some action on jurisdictional contracts under section 5 of the Natural Gas Act). I can assure you that I plan to present an interim rule to the Commission as soon as possible. At present, one is scheduled for Commission consideration at its July 28 public meeting. As soon as the Commission acts, I will forward a copy to you and the other Members of the Committee.

Senator Ford, cont.

Question 2: The most serious flaw the Court found in Order No. 436 was the Commission's failure to act directly on take-or-pay. The Court found the Commission's factual record ambiguous on the effectiveness of using Section 5 of the Natural Gas Act to remedy jurisdictional contracts and directed the Commission on remand to "make clear the extent to which contracts for jurisdictional gas account for the basic economic problem" and to "reassess its refusal to act under section 5." The Court also found that pipelines' conditioning access on producer take-or-pay relief was not undue discrimination or backdoor producer regulation. The Court instructed the Commission "justify its inaction" on take-or-pay. The Commission has repeatedly said that section 5 relief for take-or-pay should be determined on a case-by-case basis. The Commission also has several complaints pending which are inactive and have not even been set for hearing. In light of the Court's instruction "to reassess its refusal to act under section 5," does the Commission plan to pursue these complaints individually or generically through a rulemaking?

Answer 2: At present, I am unable to say what steps the Commission will take to address take-or-pay costs, both past and present, in response to the Court's decision. The Commission is examining numerous options, including those suggested by the court with respect to action at the wellhead to contain these costs. These include conditioning producers' access to transportation on their granting pipelines take-or-pay relief and taking some action on jurisdictional contracts under section 5 of the Natural Gas Act.

Senator Ford, cont.

Question 3: There are also several complaints before the Commission raising the so-called Title I issue regarding possible violation of maximum lawful prices by paying for gas which cannot be made up. It was widely rumored that the Commission was considering acting on the Title I issue before the court decision. In a footnote, the court briefly mentions this argument with little support. Has the Court's dictum on this point affected the Commission? Are you presently considering acting on the Title I issue?

Answer 3: As you note, the discussion in Associated Gas Distributors v. FERC (at pages 78-79 of the slip opinion) of whether take-or-pay prepayments violate Title I is only dicta. Moreover, the Court noted that the Commission was not obliged to consider the Title I issue in Order No. 436. The Commission is reviewing the court's decision in connection with its consideration of the pending complaints and petitions for declaratory orders related to Title I in determining the appropriate resolution of these matters.

Senator Ford, continued

Question 4: In the past the Commission has expressed doubts about its authority to condition producer access to transportation. But in its decision, the Court gave the Commission a clear blueprint of action: linking renegotiation of unresponsive wellhead contracts to producers being granted access to pipeline transportation and setting aside the take-or-pay clauses of jurisdictional contracts. Doesn't the Court opinion confirm that in fact the Commission does have such authority and invite the Commission to use this authority to get at the take-or-pay problem?

Answer 4: The Court's opinion does appear to confirm that authority. Although the Court remanded to the Commission to determine to what extent inaction on uneconomical producer-pipeline contracts may be justified, it did not expressly require us to reach any particular conclusion.

Senator Ford, cont.

Question 5: Instituting a system of conditioned access might help address future take-or-pay costs, but hundreds of millions of dollars have been paid or remain to be paid for past obligations. What steps has the Commission taken, and what steps do you plan to take to deal with the mammoth past take-or-pay obligations already incurred? What is the current status of the proposed take-or-pay policy statement and when will that be finalized?

Answer 5: On March 5, 1987, Commission issued a proposed policy statement on pipeline recovery of take-or-pay buyout and buydown costs in Docket No. PL87-3-000. The policy statement is designed to encourage elimination of accrued take-or-pay liability by providing a mechanism through which pipelines willing to bear an equitable share of the burden may recover a portion of the costs of such buyouts from their customers. The Commission is currently reviewing the numerous comments received on the proposed policy statement in the context of the remand of Order No. 436, and hopes to act in the near future to take final action in this proceeding.

The Commission has also set for hearing proposals by several pipelines to institute billing mechanisms designed to permit recovery of take-or-pay buyout costs and similar expenditures by directly billing past and current customers for many of those costs. Two of these proceedings, Tennessee Gas Pipeline Company, Docket No. RP86-119-000, and Transwestern Pipeline Company, Docket No. RP86-126-000, have recently been the subject of initial decisions which are currently pending before the Commission. Thus, the Commission will have an opportunity, once these matters are fully briefed, to address these individual billing proposals on the merits.

Senator Ford, continued

Question 6: Inasmuch as the Court apparently found that conditioned access was not undue discrimination, would you agree that pipelines may now lawfully condition access and refuse to transport gas for producers not granting take-or-pay relief? And if so, what limits, if any, should the Commission place on this power to deny access?

Answer 6: Inasmuch as the Court's mandate has not issued and the regulations promulgated by Order No. 436 are still in effect, Order No. 436 pipelines transporting gas for producers not granting take-or-pay relief are subject to sections 284.8(b) and 284.9(b) of the Commission's regulations (the non-discriminatory access condition for firm and interruptible transportation). Amending those sections, however, is obviously one of the options being considered by the Commission in light of the Court's decision. The Court found elusive why pipeline denial of access to producers should be viewed as unduly discriminatory. If the Commission were to condition access, limits on the power to deny access should be seriously considered. The wellhead market is considered to be competitive, as intended by Congress. The transmission system, on the other hand, is still in many respects monopolistic and monopsonistic. Therefore, any access condition would have to be crafted to prevent to the extent possible any unnecessary restraints on the competitive wellhead market.

The Commission is still reviewing the court's opinion and is considering whether and, if so, under what circumstances, pipelines should be permitted to refuse to transport gas for producers not granting take-or-pay relief.

Senator Ford, cont.

Question 7: Judge Mikva strongly suggests that "doing nothing" is no longer an option for the Commission on take-or-pay. Do you agree?

Answer 7: Since I joined the Commission last October, I have thought that the Commission does not have the option of doing nothing on take-or-pay. Accordingly, resolution of take-or-pay was a principal goal of my natural gas strategy announced in January.

Senator Ford, cont.

Question 8: How does the Court's decision affect the Commission's proposed policy statement on recovery of take-or-pay buy-out, buy-down costs?

Answer 8: The broad take-or-pay issues addressed by the Court are also addressed in the Commission's proposed policy statement. The Court's decision does not directly affect the recovery mechanisms discussed in the proposed policy statement. The proposed policy statement was intended to provide guidelines for the timely resolution of the take-or-pay problem. In its decision, the Court discussed several other options that could be used to help resolve the take-or-pay problem. These options , as well as the Commission's proposed policy statement, are currently under review by the Commission.

Senator Ford, cont.

Question 9: The D.C. Circuit ruled that the Commission could not rely on its Natural Gas Act Section 7 authority as a basis for CD conversions and that no separate, adequate justification was stated for CD reduction.

Question 9(a): Does the Commission intend to reassert CD conversions under section 5 of the Natural Gas Act, as suggested by the Court, in order to give pipeline customers continued access to transportation?

Answer 9(a): At present, I am unable to say whether the Commission will reassert CD conversions since that issue is pending before the Commission.

Question 9(b): As for CD reductions, what separate justifications are there for CD reductions in addition to CD conversions?

Answer 9(b): Because this an issue pending before the Commission on remand of Order No. 436, I am unable at this time to describe a separate justification for CD reduction in addition to CD conversions.

Question 9(c): What legal difference is there in allowing unilateral CD reduction in pipeline rate schedules under Section 5 of the Natural Gas Act versus allowing unilateral modification of take-or-pay clauses in producer rate schedules under Section 5?

Answer 9(c): The Commission has jurisdiction over the sales contracts between interstate pipelines and their wholesales customers, but may assert jurisidiction directly over only those producer contracts which involve gas dedicated to the interstate market under the Natural Gas Act. The Commission can only indirectly affect other contracts between producers and interstate pipelines.

Since the Commission does not have jurisdiction over non-dedicated gas, the Commission need not grant NGA section 7(b) abandonment authorization for the producer to terminate service as it needs to do in the event of termination of purchases of dedicated gas and CD reductions. Also, CD reductions involve actions on the part of the customers, which are often non-jurisdictional, to alter the contract, whereas it is the jurisdictional pipeline which is seeking to alter the producer contract.

Senator Ford, cont.

Question 10: Under the Natural Gas Act pipelines have service obligations to many, if not most of their customers; that is, an obligation to have reserves of gas available to fulfill service to that customer. In this era of competition, however, customers of the pipelines are being given the opportunity and encouragement to buy gas from other sources. Are pipelines still under a legal obligation to maintain reserves of gas and can they realistically maintain reserves if customers are not buying gas from the pipeline?

Answer 10: There has been no regulatory requirement in effect since the middle 1960's obligating interstate pipelines to maintain a specified level of reserve delivery life to meet existing sales obligations. Pipelines, however, do have a service obligation under the Natural Gas Act to meet all certificated sales requirements. The methods for meeting these requirements are left for the prudent management of the pipelines to determine. Recognizing that new mechanisms are needed to allow supplies to respond more accurately to the demands of the marketplace, the Commission has recently approved a proposed rule that would grant automatic authority to a pipeline to abandon the purchase or to a producer to abandon the sale of gas under a contract between a producer and a pipeline. Docket RM87-16-000, 52 Fed. Reg. 18,703 (May 19, 1987). Under this proposed rule, abandonment would be granted if the contract has expired or if the parties mutually agree to terminate or modify the contract. Either party could terminate when the contract term expires.

Questions for the Record From Sen. Melcher

Question 1(a): I understand the Commission is considering auctioning pipeline capacity and has retained some academic consultants to work on this idea. Is this correct? What is the status of this work?

Answer 1(a): Two teams of academic consultants are analyzing for the Commission some important issues concerning auctions of natural gas pipeline capacity. One team is led by Vernon L. Smith of the University of Arizona and the other by Charles R. Plott of the California Institute of Technology. Results from the analysis of the empirical evidence generated in this research will be given to us orally by the end of September and in written form by the end of October.

Senator Melcher, cont.

Question (1)(b): Can you explain to me how auctioning would work? Could, for example, one pipeline buy capacity on another pipeline? Would the successful bidder be subject to FERC regulation? Would local distribution companies have an automatic right to any capacity they needed to meet their needs?

Answer (1)(b): As Chairman Hesse pointed out during the May 28 hearing, the concept of an auction process is currently being studied. However, one possibility of how the auction process would operate is that existing and potential customers of a pipeline would file monthly capacity demands by pipeline segments at the price offered by the pipeline. A determination must then be made as to whether excess capacity exists or any overbooking of capacity has occurred on any particular pipeline segment at the price offered. If segments are overbooked, the auction process continues by increasing the price for the overbooked segments and by decreasing the price for the underbooked segments. The auction process continues until all demand is satisfied.

Under the auction process, a pipeline customer of the pipeline conducting the auction is permittied to bid for capacity as are the other existing and potential customers of the auction pipeline.

It is intended that the auction process would be conducted within the context of a general rate case filed with the Commission. As such, the rates must be determined to be just and reasonable rates by the Commission. A successful bidder would not necessarily be subject to the jurisdiction of the Commission by virtue of his participation in the auction. Jurisdiction would be determined based on whether the activities (i.e. transportation of gas in interstate commerce) of the successful bidder were subject to the Commission's jurisdiction.

A local distribution company (LDC) would not be deprived of any right to any capacity it needed under the auction process. The LDC would be allowed to adjust the amount of capacity necessary to satisfy its needs.

Senator Melcher, cont.

Question 2(a): How many state comprehensive plans has FERC received in response to the Committee's recent amendments to Section 10 of the Federal Power Act?

Answer 2(a): In January 1987, the Commission staff sent letters to all state governors and federal natural resource agencies requesting a list of comprehensive plans in accordance with Section 10(a)(2)(A) of the Federal Power Act (FPA). The Commission received 26 responses, which included 21 plans submitted for review as comprehensive plans. To date, the Commission had identified, by means of orders issuing licenses, two plans that qualify as comprehensive plans pursuant to Section 10(a)(2)(A) of the FPA. These are the Northwest Power Planning Council's (1) Northwest Conservation and Electric Power Plan (1986) and (2) Columbia River Basin Fish and Wildlife Program (1984, as amended 1987). This does not mean that these are the only plans of the ones submitted that qualify as comprehensive plans; it only means that to date these are the qualifying plans that have been identified in Commission license orders.

Question 2(b): What kind of process has the Commission established for handling these plans?

Answer 2(b): In Fieldcrest Mills, Inc., the Commission stated that it considered plans to qualify under Section 10(a)(2)(A)

> only if such plans reflect the preparers' own balancing of the competing uses of a waterway, based on their data and applicable policy considerations (i.e., consider and balance all relevant public use considerations). With regard to plans prepared at the state level, such plans are within the scope of Section 10(a)(2) only if they are prepared and adopted pursuant to a specific act of the state legislature and developed, implemented and managed by an appropriate state agency.

In addition, Commission staff is currently investigating the possibility of aiding state efforts to develop comprehensive plans by promulgating a rule to define a comprehensive plan under Section 10(a)(2)(A).

Commission staff is reviewing the submitted plans to determine which ones fall within the scope of Section 10(a)(2)(A). The Commission, prior to issuing a license, will consider the proposed project's consistency with any applicable plan found to be a comprehensive plan under Section 10(a)(2)(A). Plans determined as not being comprehensive plans will be considered by the Commission in relation to a proposed project as part of the Commission's broad public interest examination under Section 10(a)(1) of the FPA.

Senator Melcher, cont.

Question 3: Similarly, has the Commission considered how it plans to solicit state agency comments and recommendations under ECPA?

Answer 3: Public notices are issued for license applications once they are considered acceptable for filing. These notices invite any interested members of the public and agencies to comment on the application. For projects with a capacity greater than 5 MW, the Commission requires license applicants to send copies of the application to an extensive list of state and federal agencies, and specifically to request that comments and recommendations of those agencies be submitted to the Commission. These notices and letters were expanded, shortly after the enactment of ECPA, to: (1) specifically request information required by ECPA such as state and federal comprehensive plans and fish and wildlife agencies' recommendations for terms and conditions of license and; (2) request that the recommended terms and conditions of the agencies be based on supporting technical data that should be filed with the Commission along with the recommendations.

Questions For The Record From Senator Metzenbaum

Natural Gas Issues

Question 1: FERC Order No. 451 and the proposed abandonment rule (RM87-16) appear premised on raising to economic levels those dedicated gas reserves that are currently shut in due to obligations to take, or nevetheless pay for new gas priced above market clearing levels. Allowing old gas prices to rise to the maximum lawful price (MLP), according to FERC, would bring shut-in gas to market, thereby increasing supplies and exerting downward competitive pressures on higher cost, take-or-pay burdened gas supplies.

Question 1(a): What safeguards exist to prevent old gas from entering the spot market for purchase at bargain prices by large industrial customers while not materially lowering the weighted average cost of gas (WACOG) to captive residential customers?

Answer 1(a): An interstate pipeline that is not subject to the non-discriminatory access provisions of the Commission's regulations, as promulgated in Order No. 436, is obligated to transport any gas released under Order No. 451 to any of its existing firm sales customers, and a producer is obligated to offer such firm sales customers a right of first refusal before it can sell such gas to anyone else. Furthermore, the Commission required that full requirements or sole supplier clauses be waived to enable existing firm sales customers to exercise their right of first refusal to purchase released gas.

The proposed abandonment rule would also impose an obligation on any pipeline that does not provide non-discriminatory access and that abandons purchases of gas from a producer to transport such gas for the producer. The notice of proposed rulemaking stated the Commission's concern that captive residential customers of local distribution companies might be unable to realize the benefits of the rule because of the unavailability of open-access transportation, and requested comments on how to avoid this possibility. In the course of promulgating a final rule, the Commission will carefully consider how to assure that captive residential customers have the opportunity to avail themselves of the lower-priced gas that the rule should bring the marketplace.

Question 1(b): What safeguards exist to prevent abuse resulting from agreements to abandon gas between pipelines and their affiliated producers?

Answer 1(b): A pipeline's decision to agree to or acquiesce in the abandonment of dedicated gas supplies is always subject to a review in a subsequent rate proceeding wherein the prudence of its purchasing practices is raised as an issue. Thus a pipeline that agrees imprudently to abandon low-cost gas supplies to the detriment of its customers runs the risk of not being allowed to recover fully the cost of purchasing its remaining higher-cost supplies.

Senator Metzenbaum, cont.

Question 1(c): Is FERC, by rulemaking, effectively repealing section 7(b) of the Natural Gas Act (NGA) as it pertains to producer certificates? Please explain how section 7(b) and the ruling in United Gas Pipeline Co. v. FERC, 385 U.S. 83 (1966), survive in a meaningful way.

Answer 1(c): Once gas reserves have been committed to an interstate pipeline, any sales from these reserves cannot be made to another purchaser without Commission approval under section 7(b). In other words, a producer cannot cease service to an interstate pipeline without a Commission grant of abandonment authority. Abandonment, while typically considered on a case-specific basis has previously been authorized on a generic basis and approved by the courts. The ultimate criterion in determining whether abandonment should be granted under section 7(b) is the public interest. As more fully set forth in the proposed abandonment rule (RM87-16), the Commission believes that the Congressional policy of achieving market-responsive pricing of gas that is embodied in the NGPA would be furthered by permitting generic abandonment. Permitting both producers and purchasers to terminate obligations which they consider disadvantageous in the present market would help further the objective of achieving an equilibrium between supply and demand, because gas would move more readily to the market that needs it and at the same time diminish surplus deliverability in markets where it is not needed. Thus where contracts have expired and other conditions set forth in the rule are met, abandonment is in the interest of the natural gas market as a whole and is necessary to bring about equilibrium between supply and demand.

The Commission will review comments submitted on the proposed rule and will consider all relevant factors involved in determining the overall public interest. The Commission believes that a purchaser's loss of gas where contracts have expired should not cause it, or the market it serves, to experience a shortage of supply. The move to market-responsive prices for new gas over the last eight years under the NGPA has already eliminated shortages of gas. Permitting old gas covered by expired or terminated contracts to enter the gas maket will ensure that present adequate supplies of gas continue into the foreseeable future. Therefore, there is no reason to believe that purchasers losing supplies under this rule should have difficulty replacing those supplies. In addition, the increased flexibility of supply brought about by this rule should allow purchasers to replace lost supplies at reasonable prices.

The proposed abandonment rule is consistent with section 7(b). Abandonment authorization is, and will continue to be required, for gas still subject to the NGA. Where the conditions described in the rule are met, the Commission grants abandonment authorization under the rule pursuant to section 7(b). Where the conditions are not met, a party must seek abandonment authorization by a specific filing. In enacting the NGPA, Congress limited the role of dedication under the NGA in regulating the nation's gas supply by legislating

Senator Metzenbaum, cont.

a continuing diminution of dedicated reserves with the passage of time. Security of supply at reasonable prices will be achieved through the incentive price provisions and free market forces, as intended by Congress. The proposed abandonment rule accelerates that process in light of the success of the NGPA along with other economic factors in creating a competitive wellhead market.

The Commission's abandonment proposal is also consistent with United Gas Pipeline Co. v. FPC, 385 U.S. 83 (1966) (United). United held that when an interstate pipeline purchaser ceases taking and transporting the gas that it previously purchased pursuant to its contract, such action constitutes an abandonment of a service within the meaning of section 7(b) of the Natural Gas Act for which Commission authorization is required. The proposed abandonment rule would apply to purchases as well as sales and the same rationale applies to both cessation of purchases and sales. The continuation of service obligations, whether by sellers or purchasers, beyond the term of the applicable contract prevents market forces from operating to the extent envisioned under the NGPA, and also frustrates the parties' agreement. No statutory policy is furthered by refusing to honor the parties' bargained-for arrangements.

Question 1(d): On what authority can FERC grant permanent abandonment of sales or service under section 7(b) of the NGA to applicants other than section 7(c) certificate holders?

Answer 1(d): As fully set forth in the answer to 1(c), supra, the Commission believes that generic abandonment should be permitted where the conditions in the proposed rule are met. As the Commission explained in a recent decision, Mississippi River Transmission Corp., et al., 39 FERC ¶ 61,113 (1987), purchases and sales are mirror images of the same transactions. Consequently, the purchase obligation should not be terminated without providing the sellers an equal opportunity for relief from their sales obligation. Requiring sellers to continue selling gas at a lower price than the gas commands in the market, or requiring the purchaser to continue purchasing the gas where it could satisfy its requirements with lower-priced gas, prevents the gas from being priced at its real value to the economy. If the Commission relieves the pipelines from their obligation to purchase gas from their former suppliers, it is appropriate at the same time to eliminate the seller's obligations under their certificates to continue to sell such gas to the pipelines. Thus, where the Commission grants purchasers abandonment, it leaves intact the sellers' right to sell the gas under their certificates, if they so elect. Moreover, supplemental certificates, to the extent one is required, are issued to allow the producer-sellers to sell the abandoned gas in interstate commerce to other customers, with pre-granted abandonment of any sale of the gas upon termination of the contract.

Senator Metzenbaum, cont.

Question 2: The recent ruling of the Court of Appeals for the D.C. Circuit in Associated Gas Distributors v. FERC, No. 85-1811, (AGD decision) notes that FERC could lawfully condition producer access to transportation under Order No. 436 on producer concessions in disposing of uneconomic take-or-pay contracts currently burdening the interstate pipelines and their customers. The Court also states that FERC has the requisite authority to mandate open access transportation for all interstate pipelines. Wouldn't FERC's immediate implementation of these measures accelerate the movement toward an equitable and economic equilibrium in gas markets, which has been the articulated goal of FERC in Order Nos. 436, 451, the proposed abandonment rule, and the proposed take-or-pay policy statement?

What reasons militate for and against an immediate implementation?

Answer 2: I have long considered open access transportation critical to a truly competitive natural gas market. The Commission is actively considering these and other options in the remand of Order No. 436 and expects to act swiftly to implement some of these measures.

Senator Metzenbaum, cont.

Question 3: Ms. Hesse, your March take-or-pay policy statement would require residential consumers in my state and many other states to absorb the costs of imprudent business decisions made by gas pipelines even if an evidentiary record would show that purchasing decisions had been 60, 75, or even 100 percent imprudent.

Question 3(a): Why should residential consumers pay one penny of the costs for imprudent business decisions?

Answer 3(a): The proposed policy statement does not require consumers to pay take-or-pay costs resulting from imprudent purchasing decisions. Rather, it establishes a rebuttable presumption that a pipeline's agreement to absorb an equitable share of take-or-pay costs would make a further showing of imprudence difficult. However, parties would have the opportunity to attempt to show at an evidentiary hearing that a greater percentage of the costs were imprudently incurred. If the record showed that more of the costs were imprudently incurred, the pipeline would not be able to collect these costs from its customers.

The Commission does not have jurisdiction over the rates charged to residential consumers. The rates charged by LDC's to residential costumers are subject to the jurisdiction of state public service commissions. The Commission has jurisdiction over the rates charged by pipelines to LDC's.

Question 3(b): Under your 50/50 take-or-pay split, don't pipelines and their sales customers absorb all the take-or-pay costs, while producers and industrial customers escape cost responsibility?

Answer 3(b): Under the option, some sales customers would absorb no take-or-pay costs. Moreover, many producers have settled take-or-pay disputes with pipelines. As part of these settlements, producers have amended contracts to provide for future reductions in price and take-or-pay levels.

The Commission does not directly regulate the rates charged by LDC's to their industrial customers. The Commission's proposed policy statement is not intended to prevent state commissions from equitably allocating take-or-pay costs among all of the LDC's customers including industrial customers.

Question 3(c): Is there any incentive in your proposal for producers to share in the pain of problem take-or-pay contracts?

Answer 3(c): The proposed policy statement was intended to facilitate the timely resolution of the current take-or-pay problem. This problem is the source of continuing market disorders. The Commission believes it is in the best interest of all segments of the natural gas industry, including producers, to resolve these market disorders in a timely fashion. Potential solutions to the take-or-pay problem, including those discussed by the Court in the AGD option, are currently under review by the Commission.

Senator Metzenbaum, cont.

Question 3(d): Even in a deregulatory climate, doesn't FERC have a statutory obligation to residential consumers who have little bargaining power vis-vis producers, pipelines, industrials, and large LDCs as required by the public interest standards in the Natural Gas Act?

Answer 3(d): The Commission has a statutory obligation to protect consumers against unjust and unreasonable rates being charged by natural gas companies. The Commission does not believe its proposed policy statement is inconsistent with this obligation.

Question 3(e): Shouldn't the shareholders of pipelines, LDCs and producers pay for the effects of their managements' decisions?

Answer 3(e): The Commission believes that the shareholders of pipelines should pay for the effects of imprudent management decisions. State commissions are responsible for the review of the decisions made by LDCs managements. Producers will either pay or benefit from their managements' decisions based on market conditions and potential Commission actions.

Question 3(f): In your proposed take-or-pay policy statement, (mimeo at 19) you state that the method and extent of flowthrough by LDCs of take-or-pay costs divined to be prudent on the federal level under the 50/50 split proposal will be "determined" by state utility commissions consistent with the Supreme Court's decision in Nantahala Power and Light Co. v. Thornburg, 106 S. Ct. 2349 (1986). Yet that case holds that a state may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. Doesn't this case preclude shareholders of LDCs bearing any of the burden of problem take-or-pay contracts if your 50/50 split were adopted?

Answer 3(f): The Nantahala case would appear to preclude State commissions from per se disallowing the passthrough to retail customers of take-or-pay costs approved by FERC and incurred by LDCs. However, Nantahala does not appear as a general matter to restrict the authority of state commissions to reclassify and allocate take-or-pay costs among the various customers served by the LDC, or to disallow costs as imprudent where the LDC had other reasonable choices of gas supply available to it as alternatives to its existing contracts with its existing suppliers. In certain circumstances, competitive market conditions could prevent an LDC from fully recovering the costs allocated to price sensitive customers, to that extent reducing the earnings available to LDC shareholders.

Senator Metzenbaum, cont.

Question 4(a): Order No. 436 open-access transportation was implemented by FERC nearly 2 years ago. Residential customers are paying upwards of $4 per mcf of gas today, while industrial customers buy gas for $1.50 due in large part to problem take-or-pay contracts that the D.C. Circuit said last month that FERC could not ignore in its implementation of Order No. 436.

Yet you stated at a press conference that the court decision does not change your proposed take-or-pay policy, where pipelines' shareholders would split 50/50 the overhanging take-or-pay costs with their full and partial requirements customers while interruptible customers and producer-sellers escape any cost responsibility. Moreover, under the proposed policy, producer-sellers have no incentive to share in the pain since their lucrative direct sales to interruptible (industrial) customers are unburdened, while pipelines lose any of their past leverage with the producer-sellers to renegotiate contracts.

Further, under your proposed policy, these take-or-pay costs would be borne by sales customers through a demand surcharge based on the maximum their contracts allow them to buy regardless of how much gas they actually take in the future. In essence, this is retroactive price setting because the pipeline would be setting rates to recover past losses.

In contrast, Commissioner Stalon's alternative take-or-pay policy proposal would spread the pain of take-or-pay over all units of gas moving through the pipeline system by placing the surcharge on both transportation and all sales. Placing these costs in the commodity component, so as to surcharge all gas moving through the system, removes the competitive disadvantage for the smaller group of customers that your policy would bill directly. This would also send a price signal to producer-sellers to absorb some of their take-or-pay costs in order to remain competitive. Commission Stalon's alternative policy contends that this transitional policy would efficiently and equitably give pipelines time to reoptimize their gas supply portfolios.

Question 4(a): Why shouldn't all parties share equitably and efficiently in absorbing the pain of uneconomic take-or-pay contracts?

Answer 4(a): The commission does not share this characterization of its proposal. Some small and large LDCs would receive small or no direct bills under the current proposal. The Commission recognizes that the allocation of the costs of resolving uneconomic take-or-pay contracts is a difficult issue for which there is no easy or simple answer. The allocation process requires a balancing of the goal of equitable allocation of take-or-pay costs with the goal of sending appropriate price signals. The Commission agrees that all segments of the natural gas industry should share in the resolution of the take-or-pay problem. The Commission's proposal was intended to allocate take-or-pay costs in a fair and reasonable manner. The proposal was also intended to provide incentives for pipelines to negotiate settlements of the lowest reasonable cost.

The Commission recognizes that there are other methods that can be used for allocating take-or-pay costs. The comments received on the proposed policy statement reflect various alternate allocation methodologies for these costs. These alternate allocation methodologies are being reviewed by the Commission.

Senator Metzenbaum, cont.

Question 4(b): Has your technical staff conducted any empirical studies upon which to base you proposal that a 50/50 split of take-or-pay costs between pipelines and their sales customers even roughly mirrors the percentage of take-or-pay costs prudently incurred?

If so, please provide us with a copy of this study.

Answer 4(b): No such detailed empirical studies have been made, nor could they be made, without the lengthy and time consuming hearing procedures which the Commission hoped to avoid by issuing the proposed policy statement. The proposed policy statement was intended to encourage a timely resolution and settlement of the take-or-pay problem. If these issues were fully litigated and reviewed by the courts it could be several years before the cases are finally resolved.

Senator Metzenbaum, cont.

Question (5): In formulating your 50/50 split proposal, which excludes interruptible customers from paying any take-or-pay costs, did your technical staff conduct any empirical studies showing that when pipelines contracted for long term gas supplies with producers, they did not consider how much gas pipelines' large industrial interruptible customers may be purchasing? If so, please provide us with a copy.

Answer (5): As noted in the Proposed Policy Statement, the Commission believes there is an inadequate basis to conclude that long-term gas supplies should have been or were in fact acquired by interstate pipelines for the purpose of providing service to interruptible customers. Only a few pipelines sell gas under separate rate schedules for interruptible customers. Data available from the Form No. 2 Annual Reports indicates that only 4 - 6% total gas sales by interstate pipelines were made under interruptible rate schedules (see attached table). Thus, there seems to be no reason to believe that pipelines entered into long term, take-or-pay contracts to assure supply to interruptible customers.

Rather, as indicated by page 10 of the proposed policy statments, take-or-pay clauses were involved with providing assured supply for anticipated customer's needs. Since interruptible customers of pipelines by the very nature of the service have no supply assurance, it would seem inappropriate to charge them for part of the cost of providing that assurance.

Firm and Interruptible Sales Deliveries for 25 Major Interstate Pipelines 1981-1985 (Bcf)

	1983		1984		1985	
COMPANY	FIRM	INTER	FIRM	INTER	FIRM	INTER
Algonquin						
Juris	139.7	34.7	143.4	46.1	137.8	30.0
NJuris						
TOTAL	139.7	34.7	143.4	46.1	137.8	30.0
ANR						
Juris	555.4		592.0		499.1	
NJuris						
TOTAL	555.4	0.0	592.0	0.0	499.1	0.0
CIG						
Juris	261.7		231.2		186.7	
NJuris	12.9	0.6	24.4	1.3	15.4	1.1
TOTAL	274.6	0.6	255.6	1.3	202.1	1.1
Columbia						
Juris	771.0		641.8		650.2	
NJuris						
TOTAL	771.0	0.0	641.8	0.0	650.2	0.0
Consolidated						
Juris	479.4		524.9		459.7	
NJuris	29.4	19.1		21.8		16.1
TOTAL	508.8	19.1	524.9	21.8	459.7	16.1
El Paso						
Juris	831.5		897.0		828.4	
NJuris	42.7		44.8		51.5	
TOTAL	874.2	0.0	941.8	0.0	879.9	0.0
Florida						
Juris	39.4	40.4	38.0	45.0	42.9	38.2
NJuris	1.4	112.8	0.9	121.4	0.8	119.2
TOTAL	40.8	153.2	38.9	166.4	43.7	157.4

Firm and Interruptible Sales Deliveries
for 25 Major Interstate Pipelines
1981-1985
(Bcf)

COMPANY	1983 FIRM	1983 INTER	1984 FIRM	1984 INTER	1985 FIRM	1985 INTER
Great Lakes						
Juris	33.5		27.7		36.2	
NJuris						
TOTAL	33.5	0.0	27.7	0.0	36.2	0.0
K-N						
Juris	27.3		28.9		29.0	
NJuris	43.3	4.9	47.6	4.9	42.2	3.1
TOTAL	70.6	4.9	76.5	4.9	71.2	3.1
Midwestern						
Juris	193.7	0.2	220.2	20.7	170.1	0.8
NJuris						
TOTAL	193.7	0.2	220.2	20.7	170.1	0.8
MRT						
Juris	126.9		133.4		129.6	
NJuris	15.9	10.4	16.3	9.6	15.8	8.1
TOTAL	142.8	10.4	149.7	9.6	145.4	8.1
National Fuel						
Juris	155.4	3.2	151.3	25.4	155.8	0.6
NJuris						
TOTAL	155.4	3.2	151.3	25.4	155.8	0.6
Natural						
Juris	889.9		928.6		859.8	
NJuris	7.6		9.0		8.8	
TOTAL	897.5	0.0	937.6	0.0	868.6	0.0
Northern						
Juris	489.7		481.6		459.5	
NJuris	91.8	43.8	97.5	42.9	84.7	30.5
TOTAL	581.5	43.8	579.1	42.9	544.2	30.5

Firm and Interruptible Sales Deliveries
for 25 Major Interstate Pipelines
1981-1985
(Bcf)

	1983		1984		1985	
COMPANY	FIRM	INTER	FIRM	INTER	FIRM	INTER
NW Central						
Juris	179.7	39.4	181.5	42.3	182.0	41.9
NJuris		39.0	3.4	44.1	7.5	47.6
TOTAL	179.7	78.4	184.9	86.4	189.5	89.5
Northwest						
Juris	259.8	0.1	268.7		257.4	0.1
NJuris	2.4	0.1	2.8	0.2	3.5	0.1
TOTAL	262.2	0.2	271.5	0.2	260.9	0.2
Panhandle						
Juris	449.4		394.0		315.1	
NJuris	0.2	30.1	0.4	24.8	3.9	16.0
TOTAL	449.6	30.1	394.4	24.8	319.0	16.0
Southern						
Juris	459.3		436.9		378.8	
NJuris	12.5	17.7	15.9	16.8	15.5	12.2
TOTAL	471.8	17.7	452.8	16.8	394.3	12.2
Tennessee						
Juris	841.1	21.1	899.6	66.4	540.6	10.9
NJuris	1.3	0.3	1.3	0.4	1.2	0.4
TOTAL	842.4	21.4	900.9	66.8	541.8	11.3
TETCO						
Juris	802.6	83.8	824.7	141.6	775.9	15.4
NJuris						
TOTAL	802.6	83.8	824.7	141.6	775.9	15.4
Texas Gas						
Juris	534.8		542.2		427.9	
NJuris	1.8	0.1	2.1		1.6	
TOTAL	536.6	0.1	544.3	0.0	429.5	0.0

Firm and Interruptible Sales Deliveries for 25 Major Interstate Pipelines 1981-1985 (Bcf)

	1983		1984		1985	
COMPANY	FIRM	INTER	FIRM	INTER	FIRM	INTER
Transco						
Juris	821.6		736.9		560.5	
NJuris	1.4		1.5		1.0	
TOTAL	823.0	0.0	738.4	0.0	561.5	0.0
Transwestern						
Juris	277.6		250.8		218.5	
NJuris	0.2	0.1		0.3		0.3
TOTAL	277.8	0.1	250.8	0.3	218.5	0.3
Trunkline						
Juris	305.5		275.0		208.7	
NJuris	0.2		0.1	0.6	1.5	0.5
TOTAL	305.7	0.0	275.1	0.6	210.2	0.5
United						
Juris	484.6		450.3		265.1	
NJuris	101.6	0.3	104.2	1.0	89.0	11.2
TOTAL	586.2	0.3	554.5	1.0	354.1	11.2
Grand Total	10,777	502	10,673	678	9,119	404
Percent firm	95.5%		94.0%		95.8%	

Firm and Interruptible Sales Deliveries
for 25 Major Interstate Pipelines
1981-1982
(Bcf)

	1981		1982	
COMPANY	FIRM	INTER	FIRM	INTER
Algonquin				
Juris	138.8	16.5	145.1	13.6
NJuris				
TOTAL	138.8	16.5	145.1	13.6
ANR				
Juris	644.1		548.4	
NJuris				
TOTAL	644.1	0.0	548.4	0.0
CIG				
Juris	284.9		292.0	
NJuris	30.4	8.0	26.4	3.2
TOTAL	315.3	8.0	318.4	3.2
Columbia				
Juris	1123.6		932.8	
NJuris				
TOTAL	1123.6	0.0	932.8	0.0
Consolidated				
Juris	559.6		541.1	
NJuris	39.3	13.1	30.9	22.5
TOTAL	598.9	13.1	572.0	22.5
El Paso				
Juris	1192.0		968.9	
NJuris	71.8	0.1	49.6	
TOTAL	1263.8	0.1	1018.5	0.0
Florida				
Juris	40.1	42.7	36.2	36.5
NJuris	1.4	105.2	1.3	115.3
TOTAL	41.5	147.9	37.5	151.8

Firm and Interruptible Sales Deliveries
for 25 Major Interstate Pipelines
1981-1982
(Bcf)

	1981		1982	
COMPANY	FIRM	INTER	FIRM	INTER
Great Lakes				
Juris	71.7		65.3	
NJuris				
TOTAL	71.7	0.0	65.3	0.0
K-N				
Juris	29.4		30.1	
NJuris	50.2	11.3	45.3	8.6
TOTAL	79.6	11.3	75.4	8.6
Midwestern				
Juris	291.1	0.4	227.6	0.9
NJuris				
TOTAL	291.1	0.4	227.6	0.9
MRT				
Juris	146.1		139.3	
NJuris	20.8	22.4	16.5	14.8
TOTAL	166.9	22.4	155.8	14.8
National Fuel				
Juris	189.5	11.7	178.7	3.2
NJuris				
TOTAL	189.5	11.7	178.7	3.2
Natural				
Juris	954.7		943.6	
NJuris	9.1	3.0	8.9	13.5
TOTAL	963.8	3.0	952.5	13.5
Northern				
Juris	574.4		547.0	
NJuris	138.1	41.1	101.3	39.3
TOTAL	712.5	41.1	648.3	39.3

Firm and Interruptible Sales Deliveries
for 25 Major Interstate Pipelines
1981-1982
(Bcf)

	1981		1982	
COMPANY	FIRM	INTER	FIRM	INTER
NW Central				
Juris	226.5	60.6	194.6	46.7
NJuris	3.8	75.0	0.1	46.4
TOTAL	230.3	135.6	194.7	93.1
Northwest				
Juris	318.0	0.4	280.0	0.1
NJuris	3.6	0.2	2.1	0.2
TOTAL	321.6	0.6	282.1	0.3
Panhandle				
Juris	665.8		579.6	
NJuris	3.5	36.9	3.2	27.2
TOTAL	669.3	36.9	582.8	27.2
Southern				
Juris	582.7		494.6	
NJuris	20.1	46.2	11.7	19.8
TOTAL	602.8	46.2	506.3	19.8
Tennessee				
Juris	1114.3		1014.4	18.3
NJuris	1.0	23.3	1.3	0.5
TOTAL	1115.3	23.3	1015.7	18.8
TETCO				
Juris	935.1		884.4	0.3
NJuris				
TOTAL	935.1	0.0	884.4	0.3
Texas Gas				
Juris	654.1		618.5	
NJuris	3.1		2.1	
TOTAL	657.2	0.0	620.6	0.0

Firm and Interruptible Sales Deliveries
for 25 Major Interstate Pipelines
1981-1982
(Bcf)

	1981		1982	
COMPANY	FIRM	INTER	FIRM	INTER
Transco				
Juris	900.1		934.6	
NJuris	1.9		1.6	
TOTAL	902.0	0.0	936.2	0.0
Transwestern				
Juris	313.8		290.1	
NJuris	0.2	0.2	0.2	0.1
TOTAL	314.0	0.2	290.3	0.1
Trunkline				
Juris	499.2		516.1	
NJuris	25.1	0.1	0.2	0.1
TOTAL	524.3	0.1	516.3	0.1
United				
Juris	758.5		632.9	
NJuris	303.9		232.2	
TOTAL	1062.4	0.0	865.1	0.0
Grand Total	13,935	518	12,571	431
Percent firm	96.4%		96.7%	

Senator Metzenbaum, cont.

Question 6: Many pipelines have chosen not to go open-access so far, even though the program is nearly two years old. Those pipelines' LDC customers, who serve residential consumers and large industrial customers, today pay $4.00 or more for the pipeline's system supply gas, due in large part to long-term, high-priced contracts with burdensome take or pay clauses. Under current FERC regulations, can't a closed pipeline "pick off" many of an LDC's desirable, large-volume, steady industrial customers by offering them transportation of spot market gas, which is priced today at under $1.50, while denying the LDC's request to offer the same transportation due to the voluntary nature of Order No. 436? Doesn't this bypass of an LDC preclude it from competing for transportation of spot gas for those industrial customers to the detriment of consumers, who may have to pick up a larger share of the LDC's fixed costs?

Answer 6: To date, fifty pipelines have filed for Order No. 436 blanket transportation certificates. Five more have filed tariff sheets for approval of terms and conditions to be used for section 311 transactions. The number of pipelines thus participating under this program (55) compares favorably with the 57 pipelines which participated in a previous transportation program under Order No. 60. According to Natural Gas Monthly, April 1987, the average city-gate price charged by interstate pipelines was $2.91.

In any case, and regardless of whether a pipeline is an Order No. 436 transporter, it can only "pick off" or bypass an LDC after a proceeding under NGA Section 7, wherein all parties have an opportunity to participate, or under Section 311 of the NGPA, which requires that the LDC and state PUC be notified before service commences. Moreover, a pipeline that is not transporting pursuant to Order No. 436 needs case-specific Section 7 authorization for the transportation service. Since the issuance of Order No. 436, the Commission has analyzed each Section 7 transportation proposal for unduly discriminatory elements and imposed conditions to prevent that result. For example, the Commission scrutinized the multiple proposals filed by Southern Natural Gas Company, et al., Docket No. CP86-277-001, et al., at a technical conference held in July of 1986. Parties were invited to state whether Southern had refused transportation to any person and none were made. By order issued September 11, 1986 (36 FERC ¶61,275), the Commission adopted a policy which continues to be applied to Section 7 transportation certificates. This policy provides for: (a) limiting the duration of the service to one year, (b) a statement of the pipeline's transportation policy, (c) a log of transportation requests and their disposition available for public inspection and (d) no flexible receipt point authority.

Since that time, the Commission has also established an enforcement task force to attempt to resolve informally complaints of discriminatory activities that might restrict access to transportation. Finally, formal complaints may be filed under Rule 206 of the Commission's Rules of Practice and Procedure. Given all these safeguards, it is unlikely that an LDC could be denied transportation on a non-Order No. 436 pipeline that is offering transportation to others.

Senator Metzenbaum, cont.

In light of the procedures discussed above with respect to bypass, the LDC is in an excellent position to compete for the transportation of spot gas for those same industrial customers. Its facilities connecting the pipeline to the end user are in place obviating the need for a protracted bypass proceeding and construction delay. Furthermore, those facilities may be depreciated to the point where the LDC's transportation rate is competitive in comparison to a new capital expenditure and the operating costs required by the end user for new facilities. Finally, an LDC might offer backup or standby service (for a fee) so that the end user can rely on its system supply, if necessary.

Senator Metzenbaum, cont.

Question 7: In a recent Declaratory Order, FERC declined most jurisdiction over Yukon Pacific Corporation for its proposal to construct and operate a gas pipeline to bring gas from the Alaska North Slope to Valdez, where it would be liquefied and exported to Japan, Korea, and Taiwan.

One principal rationale FERC gave for declining the section 3 Natural Gas Act jurisdiction over exports is that there are "no economic consequences to U.S. ratepayers" (mimeo at 17).

Question 7(a): Isn't the Northern Border pipeline, which was built to bring to U.S. markets North Slope gas through the Canadian "Pre-build" line, only fractionally used at this time, costing U.S. customers a hefty amount due to its underutilization?

Answer 7(a): The Northern Border pipeline, like many other U.S. pipelines, is currently experiencing underutilization. However, the level of utilization of Northern Border's capacity is not determinitive of the level of charges to its principal users. This is because Northern Border's transportation charges to its principal users or "shippers" (i.e., the shippers of the so-called "ANGTS Pre-Build gas") are billed on the basis of Northern Border's cost-of-service (essentially on the basis of costs actually incurred by Northern Border, irrespective of its throughput of gas). The charges to a particular such shipper reflects that shipper's contracted-for portion of Northern Border's total throughput capacity.

It is, of course, true that the unit amount of these charges (i.e., $ per MMBtu) to an "ANGTS Pre-Build Shipper" would be a function of the actual usage of this system by that shipper. The Commission, through a variety of orders issued over the past several years, approved adjustments to Northern Border's tariff which have had the effect of reducing the amount of Northern Border's transportation charges. Of particular significance was the Commission's approval of a "levelized" tariff charge for Northern Border. This action resulted in an immediate reduction in Northern Border's cost of service and resulting transportation charges. The Commission has also taken other steps to assist in making the ANGTS Pre-Build more marketable, thereby improving the utilization of Northern Border. For example, the Commission has approved settlements addressing take-or-pay claims related to the ANGTS Pre-Build gas. Generally, these settlements have included immediate price reductions for U.S. purchasers and other provisions to eliminate or significantly reduce the likelihood of future take-or-pay costs. In short, the Commission shares the concern raised by this question and is taking actions to increase it's utilization.

Senator Metzenbaum, cont.

Question 7(b): Couldn't the long-term export of large volumes of Alaskan gas have a significant upward impact on U.S. gas markets?

Answer 7(b): To the extent that a large volume of Alaskan gas was exported on a long-term basis, rather than that same volume being transported through the ANGTS, it is, of course, possible that an "upward impact" on U.S. gas markets could result. However, the ultimate level of natural gas resources available in Alaska -- including in particular the Alaskan North Slope -- is still a significant question. Because of this present lack of definition, long-term estimates of impacts on various possible projects would be very speculative. Moreover, Section 12 of the Alaska Natural Gas Transportation Act of 1976 (ANGTA) (15 U.S.C. § 719 et. seq.) states in pertinent part:

> ... before any Alaska natural gas in excess of 1,000 Mcf per day may be exported to any nation other than Canada or Mexico, the President must make and publish an express finding that such exports will not diminish the total quantity or quality nor increase the total price of energy available to the United States.

Thus, the Congress contemplated more than 10 years ago that this concern could arise and has provided a proper safeguard.

Senator Metzenbaum, cont.

Question 8: This question pertains to FERC's optional expedited certificate program (OEC) implemented under Order No. 436. Suppose that FERC grants an OEC for a major pipeline construction project, like the Erie project through Ohio. If an OEC, like Erie, could not keep its pipeline full by selling its transportation service to its target markets as anticipated, it might sign up large industrial customers all along its route to use its excess capacity and cover its expenses.

Could that not result in load loss for local distribution companies, requiring the LDCs to charge their remaining captive customers more, and thus raising utility costs for consumers?

Answer 8: An applicant for an OEC proposing a transportation service must state that it has applied for and will accept an Order No. 436 transportation certificate. As such, it would be obligated to offer both firm and interruptible transportation without undue discrimination. However, the bypass procedures discussed in response to your Question 6 still apply. Accordingly, an OEC applicant like all interstate pipelines, would proceed under a case-specific Section 7 proceeding under either the traditional or OEC procedures.

Again, even if the bypass is effected or at least authorized at the Federal level, the state PUC may resort to such remedies as adopting more strictly cost-based rate designs to reduce cross-subsidization by industrials to residentials and thus obviating the need for bypass; asserting jurisdiction over the facilities between the pipeline tap and the end user; or by requiring the LDC's shareholders, instead of ratepayers to bear the consequences of competition. The ultimate impact of the bypass on the LDC's customers is determined by the State PUC.

Senator Metzenbaum, cont.

Question 9: If your take-or-pay policy statement were adopted, would Columbia Gas Transmission Corporation, which serves many customers in Ohio, be able to escape any take-or-pay or other cost responsibility that a FERC administrative law judge found was the result of Columbia's imprudent business decisions?

Answer 9: The take-or-pay policy statement does not preclude the litigation of prudence issues. If, based on the evidentiary record in a particular case, the Commission finds that the take-or-pay costs are the result of the pipeline's imprudence, those costs cannot be collected from the pipeline's customers.

Senator Metzenbaum, continued

Electric Regulation

Question 1: You recently adopted a rate structure for Ocean State, a proposed combined-cycle, gas-fired, electric generating plant that is owned by subsidaries of TransCanada pipeline, and a number of electric utilities in the northeast. You were quoted in the trade press as hailing the Ocean State rate structure as a bold, innovative, competitive model for electric utilities across the nation.

The approved rate structure bases the cost-of-service and rate of return for the partners on the estimate that Ocean State will be available to operate 80% of the time. As a result, if the plant is available to generate power at a factor of more than 80%, it earns it partners a premium rate of return. Further, the approved cost-of-service rate structure allows Ocean State to pass on as prudent expenses all maintenance costs. Finally, a December 1986 technical assessment study published by the Electric Power Research Institute reported empirical data demonstrating an availability factor above 90% for a combined-cycle plant with a design similar to that of Ocean State.

Therefore, Ocean State has a great incentive to spend heavily to keep the plant available to operate 90% or even 95% of the time, and pass on all its costs to consumers.

Question 1(a): Since all but two of the Ocean State partners are also the customers for the power, how will FERC prevent Ocean State from maximizing profits to the detriment of ratepayers as long as no party can demonstrate through substantial evidence that purchases of power from alternative sources were less expensive and/or more reliable?

Answer 1(a): The Commission approved the Ocean State rate proposal, in part, to provide incentives for Ocean State to construct and operate its generating unit efficiently. One incentive in the proposal is that Ocean State be allowed to retain any extra profits that result from its ability to operate the unit at greater than an 80% equivalent availability factor. The Commission accepted 80% as the efficiency standard because it is consistent with the data compiled by the North American Electric Reliability Council in its 1985 generating data publication. As a result, any mechanism that prevented Ocean State from retaining the extra profits would be counter-productive to the incentives we are trying to achieve.

Question 1(b): Since TransCanada is a partner as well as the supplier/transporter of gas to fire the generating plant, will this affiliate relationship be held to a higher level of scrutiny to protect ratepayers?

Answer 1(b): Under section 205 of the Federal Power Act all rates and charges made by a public utility must be just and reasonable. As a general proposition, the Commission allows cost-based utility rates -- i.e., rates that allow recovery of reasonably (prudently) incurred costs. Thus all operating and capital costs are subject to Commission scrutiny at the time a rate is filed. While good faith is presumed on the part of the utility absent a showing of inefficiency or improvidence, transactions among affiliated entities are closely examined because of the absence of competitive factors. The test applied to affiliate-related costs is known as the market price test. (See Public Service Co. of New Mexico, Opinion No. 133, 17 FERC ¶ 61,123 (1981) reh'g denied Opinion No. 133-A, 18 FERC ¶ 61,036 (1982), appeal pending sub nom. Public Service Co. of New Mexico v. FERC, Nos. 821148, 84-1624 and 84-1677 (10th Cir., filed Feb. 3, 1982)). Under the market price test, the Commission determines the reasonableness of the cost of affiliate purchases by comparing the price of affiliate-related transactions to prices available from non-affiliated suppliers in a competitive market. If, under the market price test, the costs of affiliate purchases are not found to be reasonable, the Commission must determine the reasonable cost to be recovered. In Ohio Power Company, Opinion No. 272, 39 FERC ¶ 61,098 (1987) (rehearing pending), the Commission determined that the market price was the just and reasonable price for Ohio Power to pay its affiliated coal supplier, and ordered Ohio Power to refund to its ratepayers the difference between the amount paid for coal purchased from the affiliate and the comparable market price.

Question 1(c): Shouldn't FERC institute yearly prudence reviews as to whether Ocean State's rates are just and reasonable and that its fuel purchases from its affiliate, TransCanada, are prudent under the market test articulated in Ohio Power Company, Opinion No. 272 (1987), and other applicable FERC precedent?

Answer: As stated in the preceding section, FERC's statutory mandate is to assure that all rates are just and reasonable. The Commission accepted Ocean State's initial rates and found that the rates, as modified by the Commission, would not produce excessive revenues. See 38 FERC ¶ 61,140 (1987). Under section 206 of the Federal Power Act any person (or the Commission, sua sponte) may at any time file a complaint alleging that a rate is unjust, unreasonable, unduly discriminatory or preferential. Should a complaint be filed under section 206, the Commission would initiate an investigation of Ocean State's rates, including the costs of its fuel purchases from TransCanada. Under the Commission's current policy, the reasonableness of the TransCanada fuel purchase price would be tested by comparison to market prices. Finally, should Ocean States change its rate, ratepayers would be protected by the Commission's suspension and refund authority.

Question 1(d): Will the gas sales certificate applications yet to be determined by FERC look at the affiliated entity nature of TransCanada, and the proposed high demand charge for the gas sales and transportation to Ocean State?

Answer 1(d): There is no gas sales certificate application relating to Ocean State that is pending before the Commission. Ocean State proposes to purchase gas directly from ProGas Ltd. Ocean State's import application is currently pending before the Economic Regulatory Administration (ERA) in Docket No. 86-62-NG. The gas transportation certificate application, however, is pending before the Commission in Docket No. CP87-132-000. In that docket, Tennessee Gas Pipeline Company, A Division of Tenneco Inc., requests authorization to transport 50,000 dekatherm equivalent of natural gas for Ocean State from the U.S.-Canadian border near Niagara, New York to the facilities of Ocean State in Burrillville, Rhode Island. The Commission, in this case, has no jurisdiction over the sale of the gas from ProGas to Ocean State. Our jurisdiction is over the transportation of the gas by Tennessee. The ERA analyzes all aspects of the proposed sales rate, including such issues as the affiliated relationship of TransCanada and Ocean State. The Commission will, however, review the transportation rates proposed by Tennessee.

Question 1(e): Could high demand charges for TransCanada's gas affect Ocean State's decision whether to purchase gas and transportation from its affiliate, or buy gas on the spot market?

Answer 1(e): High demand charges for the Canadian gas could affect Ocean State's decision whether to purchase gas from ProGas or to buy gas on the spot market. We note, however, that Ocean State does not propose to purchase gas from its affiliate, TransCanada, but from ProGas Ltd. The gas would be transported in Canada by TransCanada to Tennessee Gas Pipeline Company's system for delivery to Ocean State.

Question 1(f): How will FERC insure that the market signal sent to electric utilities nationwide is not a framework to structure electric generation on the Ocean State model so as to avoid state commission scrutiny, and earn premium returns to the detriment of electric consumers?

Answer 1(f): As we have described, the Ocean State proposal was approved as an incentive plant to try to induce efficient construction and operation of the generating unit. If successful, this will directly benefit customers. It is not our intention, however, to induce utilities to avoid state commission regulation.

Senator Metzenbaum, cont.

Question 2: In a speech to the Edison Electric Institute (EEI) in June 1987 in Cincinnati, Ohio you proposed a competitive bidding scheme to determine true avoided costs under PURPA for electric generating capacity.

Question 2 (a): Isn't it crucial that all electric utility generating capacity be included in any bidding scheme?

Answers 2(a): The FERC staff has not yet completed its review of the necessary conditions for a bidding proccess to achieve the desired result. A number of commenters do envision a bidding role for the utility and some of those suggest that the utility must enter the bidding. If the utility is a bidder, additional precautions to ensure fair dealing among the participants may be required in order to make the process open and fair. At this time, it is premature to specify what role the utility must play in bidding processes.

Question 2(b): Could FERC mandate this bidding scheme nationally to prevent differing and sometimes inconsistent treatment on the state level in determining avoided costs under PURPA? How would FERC insure uniform implementation of the bidding criteria?

Answer 2(b): It would be unfair, confusing and wasteful to mandate a bidding scheme nationwide at this time unless there was proof that it was the only way to implement PURPA. The current implementation of PURPA's avoided cost rules is handled by the individual states and nonregulated utilities. As such, there is no nationwide uniform standard. Rather, the rules are established to serve local conditions and needs in the individual states. Although this occasionally introduces some boundary problems under the existing rules, these problems have not been a major issue in accomplishing the program objectives.

Question 2(c): Would FERC, through a rulemaking or otherwise, establish the criteria necessary for a consistent and predictable evaluation of bids? If not, please explain how FERC may implement competitive bidding.

Answer 2(c): The FERC would not directly implement competitive bidding; rather, the FERC would, if it decides bidding should be an acceptable method of determining avoided cost, provide guidelines to the implementing entities (state PUC's and nonregulated utilities) on the conditions and conduct of the bidding process. It is premature to speculate on the nature of these guidelines as staff is still studying proposals. If a rulemaking on bidding systems is undertaken, issues of consistency should be part of the discussion in order to make sure that these areas are understood and properly resolved.

Senator Metzenbaum, cont.

Question 2(d): If FERC didn't evaluate the bids, and left that process to the utility requesting capacity, how would FERC insure that the accepted bid is just and reasonable?

Answer 2(d): A basic requirement of any bidding scheme is that there must be a sufficient number of participants to provide a competitive market. Prices determined in an open competitive process are the lowest possible sustainable prices; hence, they would certainly be truly just and reasonable.

The role of the overseer of any bidding system remains to be developed along with the other characteristics of the system. As explained above, the FERC staff is still studying bidding in order to determine the acceptable characteristics of systems that lead to open, competitive outcomes. It would be premature to speculate at this juncture on what overseer chaacteristics are required in order to obtain an open, competitive bidding process.

Question 2(e): If a utility wins a bid when competing with qualifying facilities (QF) for generating capacity and its project fails, will electric ratepayers bear those costs, or would they be borne by a utility's shareholders, as owners of QFs would currently?

Answer 2(e): The FERC staff has not yet completed studies of potential bidding systems. It would be premature to speculate on the utility's role in a bidding system at this time. The various suggestions on utility-bidding roles each imply somewhat different approaches to the management of utility risk. Fair treatment of the utility and ratepayer would require matching the role the utility is allowed to take with appropriate risk treatment.

Question 2(f): Please state your reasons favoring and opposing mandatory open access to the grid for all electric power producers? Please explain your understanding of the technical difficulties, if any.

Answer 2(f): Opening the transmission grid to all electric power producers could bring the lowest cost energy sources to the market. This would promote economic efficiency gains to the nation and low prices to consumers. To accomplish this, however, both the prices that brought forth the power supplies and the prices for transmission service would have to reflect economic costs.

Access for producers does not raise the same set of issues as access for native load customers. Nevertheless, I understand that there are technical considerations with economy and reliability impacts that would have to be addressed for open access to be successful. One is the ability of generation to be dispatched along with other generating resources on the system. A second is the reliability of some generating units. A third reason is whether or not configuration of the existing transmission grid is sufficient to accommodate more dispersed sources of generation.

Senator Metzenbaum, cont.

Question 2(g): The recent AGD decision suggested that open access in gas transportation could be mandated if FERC found that the current regimen was unjust and unreasonable under section 5 of the NGA. Will FERC use this court authority and its power under section 206 of the Federal Power Act to mandate open access in the electric area?

Answer 2(g): Any Commission decision on this question will first require that two separate issues be resovled. The first is whether the Commission does indeed have broad authority under the Federal Power Act to mandate "open access." It's not clear from the AGD decision that what's allowed under the NGA is necessarily allowed under the FPA. For example, as the Court pointed out, the NGA and the FPA have "materially different" legislative histories.

The second issue is whether the Commission would want to mandate open access. As the response to the preceding question demonstrates, there are competing policy and technical considerations that must be weighed. The Commission has not yet fully evaluated whether mandated access is the best policy choice, if indeed it's an option.

Question 2(h): In your speech to EEI addressing PURPA and competitive bidding, you articulated four paramount goals that you perceive should govern the overall regulation of the electric utility industry:

-- Providing a reliable supply of electricity to consumers at the lowest possible costs;

-- Providing the correct levels of supply and reliability;

-- Allocating risk to those who can bear it most efficiently; and

-- Allocating electricity supply to its most valuable uses when the amount demanded exceeds available supply.

Question 2(h)(1): Do these goals supercede the Congressional goals of PURPA to promote, among other things, conservation of electric energy and natural gas; increased efficiency in the use of facilities and resources by electric utilities; and the development of small power production using renewable and alternative sources of energy to produce electricity? Don't your goals conflict with some of the legislative intent of PURPA?

Answer 2(h)(1): The goals referred to here apply to the regulation of the electric industry in its entirety. Not only do they not supercede the legislated goals of PURPA, they are intended to provide the means of enhancing attainment of the PURPA goals and extending the positive benefits derived from the innovative program to the electric industry. The thrust of my goals is economic efficiency in the production and the distribution of electricity. This envisions bringing the lowest cost generating resources to market, regardless of size or type as well as pricing electricity on the basis of its economic cost. Small power production will thus be encouraged to the extent it is economic and conservation by consumers will occur to the extent any foregone consumption is less valuable than the cost of electricity.

Senator Metzenbaum, cont.

Question 2(h)(2): How will these small power producers be able to compete in bids for capacity with highly efficient combined cycle gas-fired generation?

Answer 2(h)(2): Qualifying small power production facilities will retain existing PURPA benefits and would continue to be able to sell electricity to utilities under either a bidding system or an administered-price system. However, it is true that capital intense projects could be put at a disadvantage by some capacity bidding systems. The structure of the bidding system will determine how severe this disadvantage could be. A number of suggestions on how to balance a bidding system so as not to disadvantage capital intensive projects have been received by the FERC. The suggestions include allowing winning bidders to structure the payment streams to fit their own needs, allowing specific bonus points for fuel diversity and security, and imposing ranking factors by fuel source to reflect the external social benefits of using renewable or waste fuels in place of scarce fossil fuel.

Question 2(h)(3): Relying on FERC's expertise in the PURPA area, has FERC determined any policy reasons justifying differing generating capacity ceilings among the different types of small power QFs for exemptions from the FPA and the Public Utility Holding Company Act? Please explain.

Answer 2(h)(3): The FERC has not identified any policy objectives that are served by the assorted size limitations for exemption from the Federal Power Act and the Public Utility Holding Company Act. On the contrary, it has been suggested that some of the benefits that would otherwise come from waste and renewable fuels are lost because facilities are sized below efficient levels to comply with the statutory ceilings. The same effect may also arise with biomass and geothermal facilities sized under the 80 mw ceiling applicable to these fuels.

Senator Metzenbaum, cont.

Hydroelectric Regulation

Question 1: Since many hydropower dams in Ohio, New York, and New England that were first licensed in the 1930's are up for relicensing in the next few years, is FERC preparing comprehensive plans under section 10(a)(1) of the Federal Power Act (FPA), as amended last year with the passage of the Electric Consumers Protection Act (ECPA)?

Answer 1: Section 10(a) of the FPA, which, with some new language, was recodified by ECPA as Section 10(a)(1), requires the Commission to license only those projects which, in its judgment, are best adapted to a comprehensive plan for beneficial public purposes. This does not mean that the Commission is authorized to "plan" a waterway in the sense of issuing a "plan" that determines what all the various uses of the waterway should be. Rather, it means that any hydroelectric project that the Commission licenses must entail the optimal accommodation of the various beneficial public uses. In carrying out its Section 10(a)(1) responsibilities, the Commission analyzes proposed licensed projects in light of the entire record in the proceeding, as developed by the applicant, the Commission staff, intervenors, commenting state and federal agencies, and others. The Commission's decisions must be supported by substantial evidence.

Senator Metzenbaum, cont.

Question 2: Has FERC prepared any 10(a)(1) plans for any pending new license applications to date?

Answer 2: See the answer to Question 1.

Senator Metzenbaum, cont.

Question 3: ECPA mandates that the comprehensive plans compiled by FERC under 10(a)(1) must ensure that licensing and relicensing applications are consistent with a plan to best use a waterway, giving equal consideration to fish, wildlife, and environmental factors. Will FERC use the format of cumulative environmental impact statements as already required of FERC under the National Environmental Policy Act (NEPA) and the CEQ regulations implementing NEPA to develop its comprehensive plans?

Answer 3: As discussed in the answer to Question 1, the Commission will continue to examine pending proposals' potential for causing cumulative environmental impacts, as required by NEPA, and, where appropriate, will prepare environmental impact statements analyzing cumulative impacts. For example, on April 29, 1987, the Commission issued a notice of intent to prepare an environmental impact statement examining the site-specific and cumulative impacts of 24 pending projects in the Ohio River Basin. 52 Fed. Reg. 15984 (May 1, 1987).

On May 14, 1987, the Commission issued a notice of proposed rulemaking (NOPR) in Docket No. RM87-15-000 concerning revisions to the Commission's rules implementing the National Environmental Policy Act (NEPA). 52 Fed. Reg. 20314 (May 29, 1987). The proposed regulations would replace and elaborate on existing Commission regulations on NEPA and would adopt many of the NEPA regulations promulgated by the Council on Environmental Quality (40 C.F.R. Parts 1500-1508, as amended). The NOPR includes discussions on the assessment of cumulative environmental impacts.

Senator Metzenbaum, cont.

Question 4: Section 13 of ECPA amends section 10 of the FPA to require FERC to condition hydro licenses to prohibit conduct under the license that would result in contravention of the policies expressed in the antitrust laws, when not otherwise justified by the public interest. Has the FERC developed policies, review criteria, or procedures to implement this antitrust policies mandate?

Answer 4: Commission staff is in the process of analyzing the antitrust amendment made to the FPA by Section 13 of ECPA to determine the most appropriate means for the Commission to carry out its amended antitrust review responsibilities. The Office of the General Counsel has provided the Office of Hydropower Licensing with guidelines to assist it in reviewing licensing proposals to identify factual circumstances that raise the possibility of conduct under a license that would result in the contravention of the policies expressed in the antitrust laws. In the event the Office of Hydropower Licensing identifies such factual circumstances, the matter will be brought to the attention of the Office of General Counsel for detailed review. The position of Visiting Fellow and Special Advisor for Antitrust Analysis in the Office of the General Counsel was established and filled this Spring to, among other things, aid the Commission in its efforts to implement Section 13 of ECPA.

Senator Metzenbaum, cont.

Rate Design

Question 1: At page 9 of your written statement to the Committee you said, "rates must be prospective. We must leave behind our habit of setting rates by always determining what rates should have been or requiring refunds. This retrospection simply distorts price signals to the market."

Question 1(a): Don't electric utilities and interstate pipelines set new rates in the first instance when they file for rate increases under Section 205 of the FPA and section 4 of the NGA?

Answer 1(a): My testimony indicated that the Commission is at the present time considering various rate design issues and that efficiency in the market requires that rates reflect the value of the service or commodity as well as the costs. After having set forth that premise, I went on to state that:

> [F]or value to be the rate setter, rates must be prospective. We must leave behind our habit of setting rates by always determining what rates should have been and requiring refunds. This retrospection simply distorts price signals to the market.

Section 205 of the FPA and section 4 of the NGA provide that a public utility or an interstate pipeline can file with the Commission requests to change rates currently in effect. If no previous rate is on file the public utility or interstate pipeline is required to file such rate before service commences.

Question 1(b): Isn't FERC's refund authority limited to reviewing the company-proposed rate increases to insure that they are just and reasonable?

Answer 1(b): When a public utility or an interstate pipeline proposes a change in its rates or services, the Commission can suspend the effectiveness of the change for up to five months beyond the proposed effective date, after which the change becomes effective. If the Commission suspends a proposed rate increase, the increase becomes effective subject to refund. For those portions of the proposed increase determined by the Commission to be unjust, unreasonable, unduly discriminatory or preferential, which have been collected subject to refund, the Commission may order refunds. When a public utility or interstate pipeline files an initial rate it cannot be suspended. However, section 206 of the FPA and section 5 of the NGA empower the Commission to examine those rates and require the Commission to set a just and reasonable rate if it determines the rate to be unjust and unreasonable, unduly discriminatory or preferential.

Senator Metzenbaum, cont.

Question 1(c): Isn't FERC's authority "to set rates" limited to first finding that elements of the existing rates have become unjust and unreasonable based on substantial evidence, and then showing through substantial evidence that the rates it is imposing are just and reasonable? Isn't this authority propective from the time the decision is no longer subject to rehearing at FERC, a period usually extending several years into the future?

Answer 1(c): FERC's rate authority regarding rate changes is one of determining that the proposed rates are just and reasonable. It is the responsibility of the company which has filed the proposed rate to present substantial evidence to the Commission which will support a finding that the proposed rate is just and reasonable. The portion of the rate determined to be just and reasonable is effective from the date that any ordered suspension period expires. In the case of an investigation of an existing rate under section 206 of the FPA or section 5 of the NGA, the Commission must determine that an existing rate is unjust and unreasonable, unduly discriminatory or preferential. This determination must be based upon substantial evidence. Upon such finding a new rate may be imposed based upon substantial evidence indicating to the Commission that the new rate is just and reasonable. The new rate is effective, prospectively, as of the date the Commission accepts the company's compliance filing.

Question 1(d): Don't the amounts subject to refund in rate cases only include those rate increase elements for prospective periods commencing when the new rate is filed, unless FERC makes a rare finding of inaccurate data submission or imprudence based on substantial record evidence?

Answer 1(d): Amounts ordered to be refunded in a rate case are those portions of a rate found to be unjust and unreasonable, unduly discriminatory or preferential, and which have been collected from customers from the time the rate has become effective, subject to refund, until the time of refund, plus any interest ordered by the Commission. Refunds begin from the effective date of the rate charged and not prospectively from the date of the Commission's order requiring refunds.

Questions For The Record From Senator Wirth

Question 1: Ms. Hesse, in reviewing the Commission's Order 436, the Court of Appeals essentially found that the 436 program is not really a voluntary program. In fact, the Court stated that "when a condemned man is given the choice between the noose and the firing squad, we do not ordinarily say that he has 'voluntarily' chosen to be hanged." How will the Commission structure a transportation program that gives pipelines the relief they need on take-or-pay that is needed to make it economically feasible to transport gas under the 436 program?

Answer 1: At present, I am unable to say how the Commission will structure a transportation program in response to the Court's decision. We are currently scheduled to consider an action at our July 28 meeting, and are examining numerous options with respect to take-or-pay, including, as the Court suggested, conditioning producer access on their granting pipelines take-or-pay relief, taking some action on jurisdictional contracts under section 5 of the Natural Gas Act, and addressing the Court's concerns about the contract adjustment provisions of Order No. 436. I should note, however, that whatever transportation program the Commission structures will not and cannot solve all of the take-or-pay problems of the pipelines. Such a program by definition is to authorize the transportation of natural gas, not to resolve take-or-pay. More important, the Commission itself has a limited role due to its limited jurisdiction in the resolution of take-or-pay problems. The state commissions with jurisdiction over the distributors whose purchasing practices significantly affect the interstate market can also perform a critical role in addressing take-or-pay.

Senator Wirth, cont.

Question 2: One major area of concern pertains to the Commission's failure to deal with the substantial take-or-pay problems facing the pipelines. How does the Commission intend to address this deficiency in the Commission's 436 program, and when?

Answer 2: At present, I am unable to say how the Commission will address the Court's concerns about the Commission's approach to take-or-pay in Order No. 436, since the matter is pending. We are considering various responses, and plan to take the matter up at our July 28 public meeting. As soon as the Commission acts, I will forward a copy to you and the other members of the Committee.

Questions For the Record From Senator McClure

Question 1: In a June 10, 1987, speech to the Edison Electric Institute you announced and outlined your proposed "electricity strategy." As I understand your proposed strategy it would result in significant and far-reaching changes to electricity regulation, both at the federal and state level. Apart from the speech, however, there has been little, if any, further information or detail about its scope, nature or timing.

Before the Committee can analyze the proposal and reach a judgement as to its merits we need further information.

Question 1(a): What regulatory changes are you considering?

Answer 1(a): The regulatory changes that I wish to consider first fall into four categories:

(1) a new regulation to provide the states with additional guidance on how full avoided costs are to be set administratively so as to ensure, among other things, that utilities do not make capacity payments when there is no capacity to be avoided;
(2) a new regulation on bidding to provide guidance to states on establishing bidding systems [which could include utility supply proposals as well];
(3) a flexible price regulation under the Federal Power Act for Independent Power Producers; and
(4) a rulemaking on such technical issues as allowable waste fuels and PURPA data collection.

The Commission has not yet reached any decisions as to what changes are appropriate and necessary. Considerable thought and discussion among the Commissioners, staff, legislators, regulators and the public is needed to determine what revisions should be undertaken.

Question 1(b): What changes in Federal law are you considering asking Congress to make?

Answer 1(b): Since the Commission staff has not completed its review and analyses of PURPA, I am not prepared to suggest legislation to the Congress at this time. However, it is my belief that changes in the regulations can correct most major problems in PURPA implementation.

Question 1(c): Would you provide the Committee with all appropriate Commission analyses or other documents with regard to the proposed electricity strategy?

Answer 1(c): There are two documents at this time that respond to your request. These two documents, which have been prepared by the Commission Staff, are protected from public disclosure under the Government's deliberative process priviledge which is incorporated into exemption five of the Freedom of Information Act, 5 U.S.C. § 5526(b)(5) (1982). To protect the documents from disclosure, they are being submitted to the Committee under separate cover. The Commission requests that the documents not be disclosed and that they not be incorporated into the hearing record.

Question For the Record From Senator Mark O. Hatfield

Question: As you know, I continue to be very concerned about the transportation of natural gas to the Pacific Northwest, the recent Court of Appeals ruling on Order 436 served to heighten this concern. Several large industrial gas users in the region and my state's largest supplier have applied for 7(c) certificates, but these do not represent a long-term solution to the transportation problem. Please describe the actions which might be taken in the coming months to provide open transportation by the time the winter heating season arrives.

Currently, Northwest Pipeline, major industrial users, suppliers and producers are involved in negotiations in an attempt to resolve their differences on open transportation of natural gas. If these parties are able to reach agreement, will you pledge to expedite their petition within a given time, say 30 days?

Answer: The Commission is currently in the process of preparing an interim rule to ensure that open access transportation continues while the Commission considers the Court of Appeals recent decision on Order 436. On July 2, 1987, the Commission issued an order to stay the effectiveness of the Contract Demand Reduction/ Conversion provisions of Order 436 so that open access transportation can continue. On July 17, 1987, the Court authorized the Commission to put the stay into effect. Indeed, the memorandum the Court issued when it granted the Commission's motion expressly recognized that the "FERC's proposed course of action reflects an adequate recognition" that natural gas remains flowing during the period the Court's remand is under consideration. In addition, the Commission is currently in process of setting forth options to address the take-or-pay problem in an effort to assure that open access transportation remains available to your region during the heating season.

On May 1, 1987 the Commission issued an order approving Northwest Pipeline Corporation's Order No. 436 settlement offer with modifications. The offer of settlement established the rates, terms, and conditions under which Northwest Pipeline would become an open access transporter. Northwest Pipeline has not as yet accepted the modified settlement and has filed for rehearing. Currently, settlement talks with the Commission Staff, Northwest and the parties are underway in an effort to arrive at a new settlement. If a new agreement can be reached, and a new settlement filed, the Commission will act on the settlement as quickly as possible. However, the Commission's Rules of Practice and Procedure require that the parties be allowed 20 days to file comments and another 10 days to file reply comments on the offer of settlement.

These comments must then be analyzed and incorporated into the Commission's decision. In view of the Commission's stated goal in support of open-access transportation, any settlement filed by Northwest Pipeline will receive consideration as soon as possible within the guidelines of the Commission's regulations.

Questions for the Record from Senator Wallop

Question 1 : I recently received a response from Mr. Edward J. Martin, Director, Office of External Affairs for the Federal Energy Regulatory Commission, which for the most part responded to a letter I sent to you on May 12 supporting the Kern River Gas Transmission Company Pipeline Project. This project, if approved by the Commission, would transport gas from Southwest Wyoming to the Bakersfield, California area for use in enhanced oil recovery (EOR) and related cogeneration (Docket No. CP85-002).

This project is extremely important to the State of Wyoming, and while I know that the Commission will be holding hearings on September 10, 1987, I would like to know how many days of hearings the Commission is going to schedule, and I presume those would be in Washington, as well as a time frame as to when a decision on the EOR project may be reached, a month, six months, one year? The response from the Commission [to my May 12 letter] did not include this information.

Answer 1 : The hearings on the EOR project applications, which include the Kern River Gas Transmission Company application, is scheduled to commence on September 10, 1987 in Washington, DC. A pre-hearing conference is also scheduled for September 9, 1987.

No specific number of days has been set aside for the hearings. The hearings will continue until all parties have completed their cross-examination of the various witnesses, including Chairman John R. Smyth of the Wyoming Public Service Commission. The hearings are expected to last six to eight weeks.

A decision after the hearing record closes will be dependent on the time set for briefing to the ALJ, the ALJ's Initial Decision, further briefing to the Commission and the Commission's review and decision. A final decision from the Commission could occur within six months after the record closes, although it may be longer.

Senator Wallop, cont.

Question 2 : Do you have any views about EOR as a technology?

Answer 2 : EOR is a vast subject ranging from the tried and true steam flooding in the heavy oil fields in the Bakersfield, California to other experimental methods being studied by the Department of Energy and the private sector, such as solvents, micro-organisms and underground combustion. (See Rand Corparation, "Heavy Oil Resources in the United States". Prepared for the U.S. Dept. of Energy, February, 1983 and National Petroleum Council, "Enhanced Oil Recovery", June, 1984)

The particular EOR technology used in the heavy oil fields of California is very mature and is now controlled by the economics and pollution control options of the fuels used to generate steam. The advent of co-generation in conjunction with steam generation improves the economics and efficiency of the EOR technology for heavy oil recovery.

Senator Wallop, cont.

Question 3: Also, just for my general edification, I would be interested in knowing what you would consider to be the major issues confronting FERC should you continue as Chairman through the term expiring October 20, 1991.

Answer 3: In my opinion the most important issue facing the Commission today in regulating electric utilities is not whether we should create an environment that relies more on competitive market forces, but how this goal can be accomplished. Increased competition should create a more efficient and reliable industry at the lowest possible cost to consumers. The Federal Power Act was enacted, in part, to protect consumers against excessive prices and to promote competition. The increased competition that exists today -- in part due to the passage of the Public Utility Regulatory Policies Act of 1978 -- is forcing changes in the electric utility industry and how it is regulated. The traditional cost-of-service ratemaking approach may, in certain circumstances, be inadequate to meet these goals of increased competition and low costs. Instead, rates based on a competitive market may be more appropriate. While I believe these objectives are achievable, many issues must be examined. For example, how can more competition be fostered; will a competitive bidding scheme open to all potential developers -- QFS, independent power producers and utilities -- be consistent with PURPA and the Federal Power Act; can the Commission find rates based on a competitive bidding scheme or other competitive approaches just and reasonable under the Federal Power Act; how can independent power sources be integrated with utilities' traditional service responsibilities; is mandatory transmission access necessary to ensure a competitive market or could a voluntary system, with appropriate pricing flexibility, such as the Western System Power Pool experiment, be adequate to ensure a competitive market; and will these new measures facilitate advance prudence reviews, thus avoiding the current after-the-fact review approach. These issues and others are difficult and will require careful examination.

On the gas side, the major issue which the Commission will consider in the coming months is rate design. The natural gas industry is well along in its transition from wellhead to burner tip regulation to a market-regulated industry. Rates for transportation of natural gas must be designed so as to permit the market choices at the burner tip to be conveyed to the wellhead. For that to happen, choices of services must be offered at rates that reflect the value of the services being performed. Additionally, efficient use of transportation capacity requires that it be allocated to its most valued use first. Rates can be designed to achieve that economic efficiency as well. The Commission is working on crafting a Notice of Proposed Rulemaking that is designed to achieve some of these results. We will also foster an experimental pilot program to explore the most innovative of the rate design structures.

Questions for the Record from Senator Weicker

Question 1: When the Commission proposed and established the OEC procedure as part of Order No. 436, did it intend that it be used to certificate major natural gas pipelines the size and nature of Iroquois, which would be about 400 miles long, cost more than $400 million, cross hundreds of rivers and wetlands and the habitat of five wild or endangered species, traverse the Appalachian trail, and would adversely affect the personal environment of hundreds of individuals?

Answer 1: In Order No. 436, the Commission indicated that it would meet all of its responsibilities under the National Environmental Protection Act. It further stated that "for any major Federal action, an environmental impact statement would follow and extensive public comment and analysis will be solicited and used in its preparation." This would indicate that large projects could be considered under the Optional Certificate procedures. At its meeting of July 15, the Commission did consider an option of prohibiting any project requiring an EIS from qualifying for an optional certificate. However, no decision was reached and further discussion of optional cerificates was indicated by the Commission to be necessary.

Senator Weicker, cont.

Question 2(a): The predicate finding for using the OEC procedure is that the applicant bears all of the financial risk of the proposed project. Has the Commission made that finding?

Answer 2(a) : No

Question 2(b): If not, when and by what means will it make the finding?

Answer 2(b) : At the July 15, Commission meeting, various standards or tests for appropriate risk assumption were discussed. The need for more discussion and analysis was indicated by the Commission to be necessary.

Senator Weicker, cont.

Question 3: A great deal of evidence which indicates that the Iroquois Gas Transmission System (Iroquois) project in Docket No. CP86-523-000, et al. is not in the public convenience and necessity has been placed in the record by various parties.

Question 3(a): Is it not true that the optional expedited certificate (OEC) procedure only establishes a rebuttable presumption of public convenience and necessity?

Answer 3(a): That is correct. The Commission's OEC regulations prescribe a rebuttable presumption that the project is required by the public convenience and necessity, provided the applicant satisfies all of the requirements contained in the OEC regulations.

Question 3(b): Is it not true that the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact, and that if the party against whom the presumption operates produces evidence challenging the presumed fact the presumption simply disappears from the case? (For example, see: Pennzoil Company, et al. v. FERC, 789 F.2d 1128 (5th Cir. (1986)).

Answer 3(b): That was the approach adopted by the 5th Circuit in Pennzoil, in which the court reviewed the Commission's application of the Order No. 23 rebuttable presumption in favor of the contracting parties' mutual interpretation "as a matter of contract law". However, Pennzoil does not represent the only approach that courts have applied in determining what is required to overcome a presumption. Depending on the policies underlying a particular presumption, some courts have required more in rebuttal, such as, that the evidence in rebuttal be uncontradicted, clear, convincing, and unimpeached. (Krisher v. Duff, 50 N.W.2d 332, 337 (1951)). The Commission has not yet been presented the issue for decision, so it has not yet begun to determine what weight of evidence it will find necessary to rebut the presumption established by the OEC rules.

Question 3(c): Is it not true that those who seek to rebut the presumption need not prove that their evidence is correct, and that if the opponent's evidence raises a genuine issue of fact as to whether the presumption is correct that is sufficient to rebut the presumption? (For example, see: Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)).

Answer 3(c): Not entirely. Those who wish to rebut the presumption must either produce evidence demonstrating that the presumption is inaccurate, in which case the presumption will no longer apply, or they must produce evidence raising a genuine issue of material fact concerning the presumption, in which case a hearing will be established to ascertain the facts. See 18 C.F.R. § 157.104(b)(1987). As indicated in response to question 3(b) above, however, the weight of evidence necessary to demonstrate that the presumption should not apply has not been established.

Senator Weicker, cont.

Question 3(d): Is it not true that to overcome the presumption only a scintilla of evidence (i.e., something other than mere speculation) need be offered? (For example, see: Galloway v. United States, 319 U.S. 372 (1943)).

Answer 3(d): In Galloway, the Supreme Court reviewed the standards of evidence necessary to uphold a directed verdict. It is unclear how that decision would be applied in a general court review of rebuttable presumptions.

Question 3(e): Is it not true that once the presumption is overcome, the burden of demonstrating that the project is required by the public convenience and necessity returns to the applicant?

Answer 3(e): That is correct.

Question 3(f): Does the Commission plan to review the records in Iroquois to determine whether the rebuttable presumption has been rebutted? If so, when? If not, why not?

Answer 3(f): Before the Commission can issue a certificate in an OEC proceeding, the Commission must review the record to determine whether the presumption that the project is required by the public convenience and necessity has been rebutted. The Commission would conduct this analysis, however, only after it first determined that the applicant had met all of the requirements contained in the OEC regulations.